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ACCESSION.

Where it is shown that the boundary lines of the land claimed by one holding under a confirmation by the United States and a survey made by a government surveyor, were run as near as possible to a bar, the whole of which was subject to be overflowed at high water and the greater part of it to an annual overflow, so as to include all the high land susceptible of ownership, the proprietor will be entitled to the alluvion, or batture, subsequently formed on the site of the bar. *Stephenson* v. *Goff*, 99.

ACT, AUTHENTIC.

Where it does not appear from a paper offered in evidence, purporting to be a copy of an authentic act, that the original was signed by two witnesses, it cannot be admitted in evidence as the copy of an authentic act. An act is not authentic which wants the signature of either of the witnesses required by article 2231 of the Civil Code. *Thomas* v. *Kean*, 80.

ADMINISTRATOR.

See Successions, III.

ADMISSION.

See Evidence, 35. Pleading, 5.

AGENCY.

1. The cashier of the branch of a bank, may, as an act of administration, accept the surrender of a debtor of the bank, and vote for a syndic; but without an express and special authority from the directors, he cannot discharge the insolvent. The granting of such a discharge is an act of ownership, and not of administration. C. C. 2965, 2966.

Union Bank of Louisiana v. *Bagley*, 43.

2. In an action on a policy of insurance, effected on account of the plaintiffs by an agent, testimony to prove that the latter, who had a policy for his own ben-

efit on goods in the same building, designedly set fire to the building, is inadmissible, where it is neither alleged nor proved that they were in any way privy to the act. The act can no more affect the plaintiffs than if done by a stranger. A principal is liable civilly for the frauds or misrepresentations of his agent, made in the course of his employment, though he neither authorized, justified, nor participated in his misconduct, nor even knew of it; but the misconduct, or misrepresentation on the part of the agent, must be while acting as such, within the scope of his agency. Nor will the record of a suit between the agent and the defendants, on his own policy, be admissible to prove fraud and false swearing on the part of the plaintiff in the latter suit, or to show what portion of the property insured belonged to the plaintiffs in the action in which it is offered in evidence. The fraud and false swearing on the part of the agent, being in his own case and for his own purposes, was irrelevant; and the principals not being a party to the suit, the matter was *res inter alios acta*, and cannot be used against them.

Henderson v. *Western Marine and Fire Insurance Company*, 164.

3. When an agent, by whom insurance had been effected, he being named as agent in the policy, swears to the loss as his, the oath will be considered as referring to the character in which he was recognized and acted when he affected it, and not as proof of perjury. *Ib.*

4. The release of a debtor is an act of ownership, which the cashier of a bank is not authorized to do, under his general administrative powers. *Commissioners of the Clinton and Port Hudson Rail Road Company* v. *Kernan--Re-hearing*, 176.

5. An agent may be a witness in all cases, except in suits against the principal on account of the negligence of the agent. In such cases, he cannot be a witness for the principal. *Ducros* v. *Jacobs*, 453.

6. Where an agent of a third person, believing himself authorized as such to sell certain property of his principal, receives from a purchaser, who also believed that he was authorized to sell, a part of the price, which was paid over to the principal, the purchaser, on discovering the want of authority in the vendor, may recover from the principal the amount so received by him, and this, though a balance may be still due by the agent to the principal, after crediting the former with the amount paid over by him. Art. 2134 of the Civil Code does not apply to such a case. *McDonogh* v. *Delassus*, 481.

7. An agent is bound to deliver to his principal whatever he has received by virtue of his procuration, though unduly. C. C. 2974. *Ib.*

8. The relation of principal and agent is not that of debtor and creditor from the moment that the agent receives money or property for the principal. It is a trust; and does not give the agent any title to the money or property so received, which would be the case if he were regarded as a debtor. The agent may become a debtor of the principal, but not until the dissolution of the contract of agency, and his neglect or refusal to account and deliver over the funds or property. While the agency continues, the property or money in the hands of the agent belongs to the principal, the agent being a mere trustee. *Ib.*

9. An agent is a competent witness for his principal, in an action against the latter to recover a sum of money, alleged to have been paid to the agent through

error, and admitted to have been paid by him to his principal. The witness is indifferent, being responsible to one or the other party for the amount in controversy. *McDonogh* v. *Delassus—Re-hearing*, 489.

10. An attorney in fact defending an action on behalf of his principal, unless specially empowered, cannot, by any allegations or confessions in the judicial proceedings, renounce or abandon any of the rights of his principal.
Prevost v. *Martel*, 512.

AMENDMENT.

See Pleading, 12.

ANSWER.

See Pleading, IV.

APPEAL.

I. *From what Judgments an Appeal will lie.*
II. *Parties to Appeal.*
III. *Citation.*
IV. *Effect of Appeal.*
V. *Record of Appeal.*
VI. *Costs of Appeal.*
VII. *Surety on Appeal Bond.*

I. *From what Judgments an Appeal will lie.*

1. An appeal will lie from a judgment on a reconventional demand, where the amount claimed in reconvention is sufficient to give jurisdiction to the Supreme Court, though the original demand, being under three hundred dollars, no appeal could be taken from the judgment on it. In such a case, the judgment on the demand in reconvention will alone be examined on the appeal.
Hanna v. *Bartlette*, 438.

II. *Parties to Appeal.*

2. The first section of the act of Congress of 19th August, 1841, establishing a uniform system of bankruptcy, having declared that the benefit of the act shall not be extended to any one owing debts in consequence of a defalcation as a guardian, a tutor, against whom a judgment has been rendered for an amount due to the minors under his care, and who subsequently applied to be declared a bankrupt and was discharged as such, not being protected by the proceedings in bankruptcy, may afterwards appeal from the judgment rendered against him. His assignee should not be made a party to the appeal.
Collins v. *Marshall*, 112.

3. Where a judgment has been rendered in favor of the plaintiffs, in a revocatory action to rescind a sale on the ground of fraud and simulation, and the vendor

alone appeals from the decision, the vendee must be cited as an appellee, or the correctness of the judgment cannot be inquired into, and the appeal must be dismissed. So the latter should be made an appellee, where the judgment having been against the plaintiffs, the latter appealed.

Hyde v. *Craddick*, 387.

III. *Citation.*

4. Under the first section of the act of 22d March, 1843, where a party applies for an appeal, by motion in open court, at the same term at which the judgment appealed from was rendered, no citation, or other notice to the appellee, is necessary, but where the appeal is applied for at a subsequent term citation is necessary, as the other party cannot be supposed to be then in attendance.

McCollam v. *Police Jury of Pointe Coupée*, 20.

5. Want of citation of appeal will be cured, where the party appears and contests the case on any other ground than the want of citation.

Dunbar v. *Owens*, 139.

6. It is too late after all the parties are actually before the court, to move to dismiss the appeal on the ground that citation was not served within the time prescribed by law. *Ib.*

IV. *Effect of Appeal.*

7. Where a plaintiff who has obtained a judgment below, in a case depending before the Supreme Court on a suspensive appeal, represents that his judgment has been recorded in the mortgage office, and swears that he apprehends that the defendant will conceal, or dispose of, pending the appeal, a slave, on whom he has a mortgage resulting from the recording of the judgment, he may obtain a sequestration from the lower court. C. P. 275. Act 7 April, 1826, s. 9. The appellee is not confined to his recourse on the surety in the appeal bond.

Fink v. *Martin*, 147.

8. As a general rule, the jurisdiction of the appellate court attaches as soon as the appeal bond is filed, and the lower court has no longer authority to take any steps but such as may be necessary to transmit the record to the Supreme Court, or, by a provisional and conservatory order, to secure the ultimate execution of the judgment of the appellate court. *Ib.*

9. The jurisdiction of the Supreme Court attaches as soon as the appeal bond is filed, and the citation of appeal has been issued; and the court of the first instance can take no further steps in the case, except such as may be necessary to transmit the record to the Supreme Court. C. P. 883.

Harbour v. *Brickel*, 419.

V. *Record of Appeal.*

10. Where a bill of exceptions is insufficient to enable the court to test the correctness of the decision of the inferior tribunal, its judgment will be presumed to be correct. *Thomas* v. *Kean*, 80.

11. A party who offers the records of other suits in evidence on the trial in the

lower court, is bound to file transcripts of them, at least on being apprised of an appeal, or on being required to do so. Where such transcripts, not having been filed below, could not be included in the record of appeal, the appellant will be entitled to a *certiorari*; and, in case the appellee should not file them after the writ has issued, the case will be remanded for a new trial.

Hyde v. *Craddick*, 387.

12. The time allowed for the return day of an appeal cannot be extended by the court from which the appeal was taken, but only by the Supreme Court; and on the failure of the appellant to file the transcript, or to apply to the Supreme Court, within three judicial days after the return day, for an extension of the time, the appellee will be entitled to an execution, under art. 589 of the Code of Practice. *Harbour* v. *Brickel*, 419.

VI. *Costs of Appeal.*

13. An appellee cannot, by entering in the Supreme Court a *remittitur* of a sum incorrectly allowed by the court below as special damages, throw the costs of the appeal on the appellant. *Rhodes* v. *Skolfield*, 131.

VII. *Surety on Appeal Bond.*

14. Sureties on an appeal bond are liable only where it is shown, that there is not sufficient property of the debtor to satisfy the execution. C. P. 596. This fact can be proved only by the return of the officer, charged with the execution of the judgment, showing a compliance with all the requirements of the law. A return that no property was found, and that no demand was made of the debtor because he could not be found, without showing that any demand was made of the plaintiff in execution, his agent, or counsel, is insufficient to render the sureties liable. C. P. 726, 727. *Lynch* v. *Burr*, 136.

15. No proceedings can be had against the sureties on an appeal bond, where the *fi. fa.* against the debtor was returned into court before the return day. *Per Curiam:* Had the execution remained longer in the hands of the officer, he might have found property. At all events, the surety is entitled to the advantage of every legal delay. *Ib.*

16. Where a suspensive appeal, taken from a judgment recovered in a lower court and recorded in the mortgage office, leaves the judgment unreversed, the plaintiff will be bound to urge any right he may have acquired on the property of the debtor by the recording of his mortgage, before resorting to the surety on the appeal bond. C. P. 579. *Turner* v. *Parker*, 154.

17. From the nature and terms of the obligation of the surety in an appeal bond, no recourse can be had against him where property belonging to the mass of the creditors of the appellant, subject to certain privileges and mortgages, is yet unsold. It must in such a case be shown by the creditor, that the sale of all the effects of the principal has proved insufficient to discharge his demand. C. P. 579, 596. Act 20 March, 1839, s. 20. But where it is proved that the appellant had been declared a bankrupt under the act of Congress of 1841, and that his estate, though in course of administration, is in such a situation as to afford no reasonable ground to expect that any dividend will ever be paid to

the suing creditor, he will not be bound to await the final liquidation of the bankrupt's estate, before proceeding against the surety on the appeal bond.
Flower v. *Dubois*, 191.

ARREST.

1. Though a writ of arrest may have been illegally obtained, the clerk who issued it, and the sheriff who executed it in obedience to the mandates of a competent tribunal, cannot be viewed as co-tresspassers with the plaintiff in the suit, who alone is responsible for the consequences of the proceeding.
Driggs v. *Morgan*, 119.

2. In an action for damages for a malicious arrest, evidence is admissible to prove the condition of the apartment in the jail in which plaintiff was confined. *Ib.*

3. Where one sued for damages for a malicious arrest, is not shown to have acted through malice, but to have had reasonable grounds to believe that he would succeed in his action, and no attempt was made to disprove the affidavit upon which the arrest was obtained, the case will be remanded for a new trial, where the damages allowed by the jury appear excessive. *Ib.*

4. Since the act of the 28th March, 1840, ch. 117, abolishing imprisonment for debt, no order of arrest can be legally issued after judgment. The arrest still authorized is merely a conservatory measure, for the purpose of securing the appearance of the defendant. Arts. 212, 214 of the Code of Practice, amended by the second section of the act of 28th March, 1840, ch. 117, relate only to the arrest of the defendant at the institution of the suit.
Thornhill v. *Christmas*, 543.

5. The security in a bond taken under a writ of arrest cannot be made liable, where the writ was illegally issued. *Ib.*

ASSIGNMENT.

The holder of a warrant, drawn by the auditor on the treasurer of a parish, for a certain sum, cannot assign a part of it, without the consent of the parish authorities. The latter are not bound to pay their debts by portions; nor will they be bound, though a draft for the part assigned was accepted by the treasurer, if he was not authorized to do so. *Le Blanc* v. *Parish of East Baton Rouge*, 25.

ATTACHMENT.

A judgment in favor of B. against L. having been affirmed on appeal, the former, under the act of 1839, propounded interrogatories to S. & J., who had been L.'s security on his appeal bond, who answered that they were not indebted to the latter, but had in their possession effects belonging to him, deposited with them as collateral security against any liability they might be subjected to as his factors, or securities, &c. T., a creditor of B.'s, having attached the judgment in favor of the latter, against whom he had not yet obtained judgment, took a rule in his suit against B., on the latter, on L., and on S. & J. to shew cause why the effects mentioned in the answer of S. & J. to the interrogato-

ries propounded in the first suit, should not be delivered to the sheriff to be sold, and the proceeds applied to the satisfaction of the judgment in favor of B., but deposited in court subject to its future order. *Held*, that S. & J. could not be proceeded against by a rule taken in the suit against B., to which they were strangers; and that, had they been made garnishees therein, no judgment could be obtained against them, before judgment had been rendered against B., and then only as to the effects belonging to the latter; and that the effects in their hands belonged to L., not to the debtor of T.

Lynch v. *Burr*, 136.

ATTORNEY AT LAW.

The services of counsel employed to obtain the appointment of a person as executor, are to be paid by the applicant, and not by the estate, whether the application succeed or fail. *Succession of Gourjon*, 541.

BAIL.

1. A parish judge or justice of the peace before whom a party is brought for examination, cannot admit him to bail, if the crime of which he is accused be "punishable with death, or with seven years or more imprisonment at hard labor." Act 3 May, 1805, sec. 13. *State* v. *Hébert*, 41.
2. A bail bond taken by a magistrate in a case in which he is prohibited by law from admitting the party to bail, is void; and the State cannot recover on it. *Ib.*

BANK.

1. The agreement entered into by the presidents of certain banks in New Orleans, on the 18th of August, 1841, for the purpose of guarantying the circulation of the banks represented by them, by which they bound themselves to contribute, in proportion to the circulation of each bank, as authorized by a resolution of the presidents of the 6th April, 1840, for the relief of any one of the number which might be unable to pay or secure the checks drawn on it for the weekly balances, was founded on a good consideration, and is obligatory. The resolution created a several, not a joint obligation, each bank agreeing to contribute in the ratio of its circulation to that of the circulation of all the banks.

Commissioners of the New Orleans Improvement and Banking Company v. *Citizens Bank of Louisiana*, 14.

2. A bank in liquidation under the act of 14th March, 1842, cannot be sued before any other court than that under the direction of which it is being liquidated. Sec. 8. *Ib.*
3. The cashier of the branch of a bank, may, as an act of administration, accept the surrender of a debtor of the bank, and vote for a syndic; but without an express and special authority from the directors, he cannot discharge the insolvent. The granting of such a discharge is an act of ownership, and not of administration. C. C. 2965, 2966. *Union Bank of Louisiana* v. *Bagley*, 43.
4. The legal interest on a sum discounted by a bank, is that established by its charter. C. C. 2895. *Commissioners of the Clinton and Port Hudson Rail Road Company* v. *Kernan*, 174.

5. The release of a debtor is an act of ownership, which the cashier of a bank is not authorized to do, under his general administrative powers.

Ib.—Re-hearing, 176.

6. Where one having money on deposit in a bank becomes indebted to it by the maturity of a note executed by him and held by the bank, compensation will take place, and the debts extinguish each other to the amount of the smaller of the two. *Bank of Louisiana* v. *Fowler*, 196.

7. There is a strong analogy between the *cessio bonorum* of an insolvent and the administration of the surrendered property by his syndics, and the liquidation of banking corporations, by commissioners, under the acts of 14 and 26 March, 1842. In both cases, the property vests, in effect, in the creditors, and the former owner has no longer any right or interest, but that of receiving the *residuum* after the payment of all the debts, and, for that purpose, of coercing a final settlement by the commissioners. Neither the insolvent debtor, nor the stockholders of the insolvent corporation, can appear in court to control the administration of the assets. *Mudge* v. *Commissioners of the Exchange and Banking Company of New Orleans*, 460.

8. The legislature have power to provide for the distribution among the creditors of the property of insolvent corporations, whose charters have been forfeited; and the acts of 14 and 26 March, 1842, for the liquidation of banks, are insolvent laws applicable to such corporations. *Ib.*

BANK OF LOUISIANA.

Under the 17th sect. of the act of 7th April, 1824, incorporating the Bank of Louisiana, which declares that if the bank "shall, at any time, suspend or refuse payment, in current money of the United States, of any of its notes, bills or obligations, or of any moneys received upon deposit, the holder of any such note, bill or obligation, or the person entitled to demand and receive such moneys, shall be entitled to interest thereon from the time of such suspension or refusal until the same shall be fully paid, at the rate of twelve per cent per annum," the holder of a claim can recover interest at that rate only from the time of a demand, or from the period when the bank was in default, and not from the date of a general suspension of specie payments, without such demand. This section does not apply to claims by a stockholder for dividends due by the bank. It was intended to provide for the public dealing with the bank, and not for the stockholders *inter se*. The legislature never intended to subject the stockholders to such a penalty towards each other, for not paying their dividends in specie. *Bank of Louisiana* v. *Fowler*, 196.

BANKRUPTCY.

1. The first section of the act of Congress of 19th August, 1841, establishing a uniform system of bankruptcy, having declared that the benefit of the act shall not be extended to any one owing debts in consequence of a defalcation as a guardian, a tutor, against whom a judgment has been rendered for an amount due to the minors under his care, and who subsequently applied to be declared

abankrupt and was discharged as such, not being protected by the proceedings in bankruptcy, may afterwards appeal from the judgment rendered against him. His assignee should not be made a party to the appeal.

Collins v. *Marshall*, 112.

2. One discharged as a bankrupt under the act of Congress of 19 August, 1841 who subsequently promises to pay a debt from which he was released by the bankrupt proceedings, will be liable on his promise. *Blanc* v. *Banks*, 115.

3. The 14 section of the act of Congress of 19 August, 1841, establishing an uniform system of bankruptcy, which declares, "that where two or more persons, who are partners in trade, become insolvent, an order may be made," declaring them bankrupts, "in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and all the separate estate of each of the partners, shall be taken," with certain exceptions, "and that the creditors of the company, and the separate creditors of each partner shall be allowed to prove their respective debts," &c. applies to the case of a partner in an existing partnership. It does not apply where the partnership had been dissolved previously to the application to be declared a bankrupt, made by one of its members who had been charged with the liquidation of the debts of the firm. In such a case the interest of the applicant alone vests in his assignees. *Akin* v. *Oakey*, 410.

4. An actual bankruptcy or *cessio bonorum*, either voluntary or forced, alone has the effect of rendering immediately exigible debts not matured by the lapse of the time stipulated in the contract, or by the happening of the contingency on which the parties agreed that they should become payable. The mere fact of the insolvency of the debtor does not produce such an effect. C. C. 2049. *Funes y Carillo* v. *Bank of United States*, 533.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *Acceptance.*
II. *Transfer.*
III. *Presentment for Payment, and Protest.*
IV. *Release of Parties.*
V. *Promise to Pay after Discharge.*
VI. *Pleading and Evidence in Actions on Bills and Notes.*
VII. *Prescription of Notes.*

I. *Acceptance.*

1. Where a bill is payable at a certain time after date, it is not absolutely necessary to have it accepted, an acceptance being only necessary to fix the period of payment, where a bill is payable at sight, or at so many days after sight or demand, or after a certain event. It will suffice that a demand be made of the drawees at maturity, and notice given to the drawer in case of their default. *Commercial Bank of Natchez* v. *Perry*, 61.

II. *Transfer.*

2. One who receives a note, with knowledge of an agreement between the original holder and the endorsers, that but one-fifth of the amount should be paid at maturity, a new note being given for the balance, will be bound by the stipulation. *Bush* v. *Wright*, 23.

3. A note not negotiable, in the hands of a third person, is subject to all the equities and defences which might have been opposed by the maker against the payee. *Gilmore* v. *Destréhan*, 521.

III. *Presentment for Payment, and Protest.*

4. Where a notice of protest to an endorser of a note, deposited in a post office in the parish of his residence, is addressed to him in that parish, *via* a post office in an adjoining parish, the latter being the nearest to his residence, the insertion of the word *via* will not render the notice bad. *Per Curiam:* The word *via* does not necessarily raise the presumption that the notice was forwarded to another office than that, to the name of which it was prefixed. It was, doubtless, intended as a direction to the post master at the office in which the notice was deposited, to send it to the party through the office to which it was prefixed, which was the nearest to his residence, though out of the parish; and as the post master at the latter place could not send it to any office nearer to his residence, the probability is that he kept it, according to the evident intention of the writer. *New Orleans and Carrollton Rail Road Company* v. *Ratliff*, 37.

5. Where a bill drawn on a commercial partnership, is accepted, after the dissolution of the firm, by one of the partners, payable at a particular bank, but he is not shown to have been authorized by his former partners to bind the firm, and demand of payment was made only at the bank, no demand having been made of the drawees, the drawer will be discharged.
Commercial Bank of Natchez v. *Perry*, 61.

IV. *Release of Parties.*

6. An accommodation endorser of a note will be discharged by any agreement between the holders and one of the drawers, amounting to a novation of the debt (C. C. 2194), or by which a prolongation of the term of payment is accorded to the latter. Ib. 3032. *Gustine* v. *Union Bank of Louisiana*, 412.

7. Where the legal effect of an agreement between the holder and one of the drawers of a note was to release an accommodation endorser, the rescission of the agreement may revive the original obligation of the drawer who was a party to it, but cannot revive that of the endorser, who was not a party thereto. C. C. 2038, 2040, 2041.

8. No reservation in a contract by which the holder of a note agrees to an extension of time in favor of the drawer, can prevent the discharge of an accommodation endorser, not a party to the contract. *Per Curiam:* The reservation is inconsistent with the very agreement containing it. While the agreement releases the principal debtor from a compliance with his original obliga-

tion, the reservation has for its object to insist upon its performance by the endorser. *Ib.*

V. *Promise to Pay after Discharge.*

9. Proof that the endorser of a note, who had been discharged by illegality in the protest, subsequently solicited and obtained indulgence from the holders, will not render him liable, unless it be also shown that he was aware, at the time of the application, of the circumstance which liberated him.

Bank of Louisiana v. *Holmes*, 40.

10. A promise to pay the amount of a bill, made by the drawer, after discharge in consequence of want of demand of payment of the drawees, will not be binding, unless it be shown that he was aware of his discharge at the time of the promise. *Commercial Bank of Natchez* v. *Perry*, 61.

VI. *Pleading and Evidence in Actions on Bills and Notes.*

11. Where the protest of a note and the notary's certificate of notice is offered in evidence, the opposite party cannot interrogate the notary as to whether the act offered is an original or a copy, and whether the act of record is signed by the witnesses named in the protest. *Per Curiam:* The act of the notary, such as it is presented, must have the effect it is entitled to, without any explanation by witnesses, or being eked out by parol evidence.

Bank of Louisiana v. *Black*, 59.

12. Where a protest offered in evidence in an action against the endorsers of a note, shows on its face that the note was protested in the presence of two witnesses, but that they did not sign that part of it which certifies the demand and refusal to pay, and the certificate attached, showing in what way the notices were served, appears to have been signed in the original by two witnesses, and the notary certifies a copy from his records, it is sufficient. *Ib.*

13. A note endorsed in blank, like one payable to bearer, may be sued on by any one in possession of it. *Skolfield* v. *Rhodes*, 128.

14. An allegation in a petition that a note was duly protested, is a sufficient averment of demand of payment. A special averment is not absolutely necessary. *Ducros* v. *Jacobs*, 453.

15. The plea of the general issue, in an action against the endorser of a note, throws upon the plaintiff the burden of proving all the facts necessary to a recovery, to wit: demand of the maker, protest, and notice to the endorser. *Ib.*

16. The written proof of notice of protest, provided by the act of 13th March, 1837, does not exclude parol evidence thereof. *Ib.*

17. A notary by whom the protest was made, is a competent witness, in an action against the endorser of a note, to prove notice to the latter. *Ib.*

18. The general rule is, that he who affirms must prove; but where a note payable to the payee personally, is on its face not negotiable, and the latter declares, in an agreement with the maker of the same date with the note, that the maker shall be bound to pay the same, only in the event of the payee's complying with two conditions, to wit, not endorsing a certain bond, and performing certain work, and the maker relies on a non-compliance by the

payee with the conditions of the agreement, it will, on the principle that a negative cannot be proved, be for the defendant to prove that the payee did endorse the note, and for the plaintiff to establish a compliance with the other condition, to wit, his performance of the work. *Gilmore* v. *Destrehan*, 521.

VII. *Prescription of Notes.*

19. Prescription runs against a note payable on demand from its date, not from that of the demand. *Per Curiam:* Prescription attaches to a right from the moment that it can be exercised. *Andrews* v. *Rhodes*, 52.

20. Defendant sued on a note without date, but bearing interest from a certain day, pleaded prescription, and the court, assuming that the note was made on the day from which it bore interest, gave judgment in his favor. *Held*, that the court erred in assuming that the note was made on the day from which it bore interest; and that defendant was bound to prove the facts from which relief was sought under the plea of prescription. *Ib.*

CITATION.

1. The insertion of the title of the suit in any part of the citation served on the defendant, in such a manner as to preclude any mistake, is a sufficient compliance with art. 179 of the Code of Practice, which does not prescribe that the title shall be inserted in any particular part of the citation.
Bank of Louisiana v. *Elam*, 26.

2. The return of a sheriff stating the manner in which a citation was served cannot be contradicted by evidence where that officer has not been called on to correct it. *Ib.*

3. The notification of the filing of the account and tableau of distribution of an executor, operates as a citation to all persons concerned, creditors as well as legatees; and the homologation of the account and tableau, bars all further enquiry as to all matters included therein. *Succession of Peytavin*, 118.

4. A citation headed as issued from "the District Court of the Fourth Judicial District for the parish of P. C." reciting that the action is pending before the said District Court, witnessed by the judge, and signed by the clerk of that District Court, and requiring the defendant to file his answer "in the office of the clerk of the court of the parish first aforesaid, at the court house," &c. is sufficient. *Per Curiam:* The defendant could not be mistaken as to the court before which he was called on to answer. *Driggs* v. *Morgan*, 119.

5. Want of citation of appeal will be cured, where the party appears and contests the case on any other ground than the want of citation.
Dunbar v. *Owens*, 139.

6. It is too late after all the parties are actually before the court, to move to dismiss the appeal on the ground that citation was not served within the time prescribed by law. *Ib.*

CLINTON AND PORT HUDSON RAIL ROAD COMPANY.

1. Neither the charter of the Clinton and Port Hudson Rail Road Company, (Acts of 7th Feb. 1833, 10th March, 1834, etc.) nor the by-laws of the Compa-

ny, conferred any authority on their cashier to release a debtor of the Company's by substituting another in his place. *Commissioners of the Clinton and Port Hudson Rail Road Company* v. *Kernan*, 174.

2. The provision of the 19th section of the act of 1834, relative to the Clinton and Port Hudson Rail Road Company, which declares, that the mortgages for stock and loans granted by virtue of that act, shall bear interest at the rate of ten per cent a year, after maturity, until paid, applies only to subscriptions for the part of the stock to be secured by mortgage. Under the charter, eight per cent is the rate of legal interest, arising *ex mora*, on a note given for money loaned. Sec. 8. *Ib.*

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

I. *Civil Code.*
II. *Code of Practice.*

I. *Civil Code*

180, 181. Responsibility of master for acts of slave. *McCargo* v. *The Merchants Insurance Company of New Orleans*, 234.
356. Prescription. *Gourdain* v. *Davenport*, 173.
495. Possession. *Laizer* v. *Generes*, 178.
586, 587. Usufruct. *Wimbish* v. *Gray*, 46.
1105 to 1111. Successions. *Valderes* v. *Bird*, 396.
1112. ——— *Succession of Duplessis*, 193. *Valderes* v. *Bird*, 396.
1113 to 1125. Successions. *Valderes* v. *Bird*, 396.
1148 to 1151. ——— *Succession of Ogden*, 457.
1155 to 1157. ——— *Valderes* v. *Bird*, 396.
1163. ——— *Succession of Ogden*, 457.
1468. Donations. *Succession of Bousquet*, 143.
1473, 1474, 1599, 1602, 1603. Donations. *Prevost* v. *Martel*, 512.
1664, 1665. ——— *Succession of Duplessis*, 193.
1697, 1700 to 1702. ——— *Prevost* v. *Martel*, 512.
1813, 1818. Contracts. *McRae* v. *Chapman*, 65.
1906. ——— *Hepp* v. *Commagère*, 524.
1945 to 1948. Interpretation. *Ross* v. *Garlick*, 365.
1953. ——— *Andrews* v. *Rhodes*, 52.
1967. Action to avoid Contracts. *Hyde* v. *Craddick*, 387.
1970. ——— *Ibid. Dumas* v. *Lefebvre*, 399.
1971, 1972. ——— *Dumas* v. *Lefebvre*, 399.
1989. ——— *Gates* v. *Legendre*, 74.
2016. Contracts. *Gilmore* v. *Destréhan*, 521.
2038. ——— *Gustine* v. *Union Bank of Louisiana*, 412. *Gilmore* v. *Destréhan*, 521.
2040, 2041. —— *Gustine* v. *Union Bank of Louisiana*, 412.
2049. ——— *Funes y Carillo* v. *Bank of the United States*, 533.

2073, 2075. Contracts. *Commissioners of New Orleans Improvement and Banking Company* v. *Citizens Bank of Louisiana*, 14.
2080. ——— *Laurans* v. *Garnier*, 425.
2122. ———, *Hepp* v *Commagère*, 524.
2134. ——— *McDonogh* v. *Delassus*, 481.
2160. Imputation of payment. *Union Bank of Louisiana* v. *Kindrick*, 51.
2173. Insolvency. *Union Bank of Louisiana* v. *Bagley*, 43.
2194. Novation. *Gustine* v *Union Bank of Louisiana*, 412.
2204. Compensation. *Bank of Louisiana* v. *Fowler*, 197.
2205. ——— *Bagley* v. *Tate*, 45.
2231. Authentic act. *Thomas* v. *Kean*, 80.
2255, 2256. Evidence. *Bauduc* v. *Conrey*, 466.
2260. ——— *Ducros* v. *Jacobs*, 453.
2265. *Res judicata*. *Preston* v. *Slocomb*, 361.
2300. Responsibility of master for acts of slave. *McCargo* v. *Merchants Insurance Company of New Orleans*, 234.
2317, 2318, 2321, 2327, 2355. Husband and Wife. *Gates* v. *Legendre*, 74.
2363. Husband and Wife. *Wimbish* v. *Gray*, 46.
2367. ——— *Gates* v. *Legendre*, 74. *Turner* v. *Parker*, 154.
2371. ——— *Wimbish* v. *Gray*, 46.
2377. ——— *Babin* v. *Nolan*, 373.
2408. ——— *Gates* v. *Legendre*, 74.
2412. ——— *Sowell* v. *Cox*, 68.
2428. Sale. *Kohn* v. *Byrne*, 113.
2449. —— *Clarke* v. *Lockhart*, 5.
2455, 2461. —— *Laurans* v *Garnier*, 425.
2485. —— *Laizer* v. *Generes*, 178.
2488. —— *Skolfield* v. *Rhodes*, 128.
2599. —— *McRae* v. *Chapman*, 65.
2683, 2684. Lease. *Bauduc* v. *Conrey*, 407.
2805. Interest. *Commissioners of Clinton and Port Hudson Rail Road Company* v. *Kernan*, 174.
2949. Judicial Sequestration. *Fink* v. *Martin*, 147.
2965, 2966. Agency. *Union Bank of Louisiana* v. *Bagley*, 43.
2971, 2973, 2974. ——— *McDonogh* v. *Delassus*, 481.
3006, 3032. Surety. *Gustine* v. *Union Bank of Louisiana*, 412.
3259, 3260. Mortgage. *Hubbard* v. *Griffin*, 383.
3287. Wife's mortgage. *Gates* v. *Legendre*, 74.
3367. Discussion. *Bagley* v. *Tate*, 45.
3416. Possession. *Laizer* v. *Generes*, 178.
3499, 3500. Prescription. *Davis* v. *Houren*, 402.
3501. ——— *Driggs* v. *Morgan*, 119.
3507. ——— *Laurans* v. *Garnier*, 425.
3508. ——— *Davis* v. *Houren*, 402.

II. *Code of Practice.*

47, 48, 49. Possessory action. *Bauduc* v. *Conrey*, 407.

73. Exception of discussion. *Bagley* v. *Tate*, 45.
179. Citation. *Bank of Louisiana* v. *Elam*, 26.
212, 214. Arrest. *Thornhill* v. *Christmas*, 543.
269, 275, 279, 280, 283. Sequestration. *Fink* v. *Martin*, 147.
296, 297. Injunction. *Sowell* v. *Cox*, 68.
298. Injunction. *Gill* v. *Her Husband*, 28. *Sowell* v. *Cox*, 68.
299. ——— *Sowell* v. *Cox*, 68.
300. ——— *Gill* v. *Her Husband*, 28. *Sowell* v. *Cox*, 68.
301. ——— *Sowell* v. *Cox*, 68. *Turner* v. *Parker*, 154.
302 to 309. ——— *Sowell* v. *Cox*, 68.
374, 377. Reconvention. *Driggs* v. *Morgan*, 119.
396. Opposition of third persons. *Gil* v. *Her Husband*, 28.
397, 398. ——— *Staples* v. *Bouligny*, 424.
401. ——— *Gil* v. *Her Husband*, 28. *Turner* v. *Parker*, 154.
402. ——— *Turner* v. *Parker*, 154.
403. ——— *Gil* v. *Her Husband*, 28. *Sowell* v. *Cox*, 68. *Turner* v. *Parker*, 154.
484. Trial. *Thomas* v. *Kean*, 80.
487. Bill of exceptions. *Mathias* v. *Lebret*, 94.
549. Costs. *Fink* v. *Martin*, 147.
579. Appeal. *Turner* v. *Parker*, 154. *Flower* v. *Dubois*, 191.
589. ——— *Harbour* v. *Brickel*, 419.
596. ——— *Lynch* v. *Burr*, 136. *Fink* v. *Martin*, 147. *Flower* v. *Dubois*, 191.
676. Sale under execution. *Bauduc* v. *Conrey*, 466.
678. ——— *McRae* v. *Chapman*, 65.
681. ——— *Wright* v. *Higginbotham*, 30.
683, 684. ——— *McRae* v. *Chapman*, 65. *Perry* v. *Holloway*, 107.
686. ——— *Union Bank of Louisiana* v. *Smith*, 49.
689. Judicial Sale. *Felps* v. *Commissioners of Clinton and Port Hudson Rail Road Company*, 89.
711. ——— *McRae* v. *Chapman*, 65.
715. Discussion. *Sowell* v. *Cox*, 68.
619. Judicial Sale. *Turner* v. *Parker*, 154.
726, 727. Execution of Judgments. *Lynch* v. *Burr*, 136.
732, 733. Executory process. *Courtney* v. *Andrews*, 180.
739, 740. ——— *Sowell* v. *Cox*, 68.
883. Appeal. *Harbour* v. *Brickel*, 419.
972. Successions. *Succession of Duplessis*, 193.
984. ——— *Brent* v. *Slack*, 372.
989. ——— *Succession of Desorme*, 474.
990, 991, 992. ——— *Succession of Ogden*, 457.
1007. ——— *Ib.—Re-hearing*, 479.

COMPENSATION.

1. Where one having money on deposit in a bank becomes indebted to it by

the maturity of a note executed by him and held by the bank, compensation will take place, and the debts extinguish each other to the amount of the smaller of the two. *Bank of Louisiana* v. *Fowler*, 197.

2. Between the parties, compensation, whether by operation of law or by way of exception, produces the same result. When it is ascertained that the parties are mutually indebted to each other at a particular time, from that moment the two debts are extinguished for equal amounts. C. C. 2204. *Ib.*

CONSTITUTION OF THE UNITED STATES.

Art. 1, sect. 8. Power of Congress to lay taxes, imposts, duties, &c. *Master and Wardens of Port of New Orleans* v. *Prats*. 459.

——— sect. 10. Restriction on power of States to lay imposts, duties, &c. *Ib.*

CONTINUANCE.

1. Where a defendant swears that his principal counsel is unable to attend, as he is informed and believes in consequence of severe illness, and that he cannot safely go to trial without him, he is entitled to a continuance. *Smelser* v. *Williams*, 97.

2. Where a rule of court requires, that the subpœna for a witness shall be given to the sheriff, at the latest, on the day preceding that on which the case is fixed for trial, a party will not be entitled to a continuance on account of the absence of a witness, for whom a subpœna was not delivered to the sheriff in compliance with the rule. *Brown* v. *Forsyth*, 116.

CONTRACTS.

1. The agreement entered into by the presidents of certain banks in New Orleans, on the 18th of August, 1841, for the purpose of guarantying the circulation of the banks represented by them, by which they bound themselves to contribute, in proportion to the circulation of each bank as authorised by a resolution of the presidents of the 6th April, 1840, for the relief of any one of the number which might be unable to pay or secure the checks drawn on it for the weekly balances, was founded on a good consideration, and is obligatory. The resolution created a several, not a joint obligation, each bank agreeing to contribute in the ratio of its circulation to that of the circulation of all the banks. *Commissioners of the New Orleans Improvement and Banking Company* v. *Citizens Bank of Louisiana*, 14.

2. A joint obligation is created where several persons join in the same contract, to do the same thing (C. C. 2075), but a several obligation when what is promised by one of its obligors is not promised by the others, but each promises separately for himself to do a distinct thing. Such obligations, though contained in the same act, are as distinct, as if in different acts, made at different times. Ib. 2073. *Ib.*

3. A bail bond taken by a magistrate in a case in which he is prohibited by law from admitting the party to bail, is void; and the State cannot recover on it. *State* v. *Hébert*, 41.

4. The prescription of one year, established by art. 1989 of the Civil Code, applies to actions by creditors for the rescision of a contract made in fraud of their rights; not to a suit by creditors holding legal mortgages, to rescind, as to them, a judgment decreeing a general mortgage in favor of the wife on the property of the husband, for the reimbursement of a donation *propter nuptias* made to her by the latter. *Gates* v. *Legendre*, 74.

5. One who has contracted for a building at a fixed price, will be responsible for the value of extra work, where, from the evidence, it is clear that it must have been done with his consent. *Mathias* v. *Lebret*, 94.

6. One discharged as a bankrupt under the act of Congress of 19 August, 1841, who subsequently promises to pay a debt from which he was released by the bankrupt proceedings, will be liable on his promise. *Blanc* v. *Banks*, 115.

7. A prison-bounds bond will be binding, though it do not conform literally to the words of the statute; it is sufficient that it complies with it in substance. Thus, where a bond, instead of being made payable to the sheriff, is made directly to the party for whose benefit it was intended, such an informality cannot prevent the party interested from recovering on it. *Per Curiam:* Exemption of the debtor from imprisonment is a legal consideration for the bond; and every engagement entered into for a good and lawful consideration is binding, whatever be its form. *Dunbar* v. *Owens*, 139.

8. Error or want of consideration must be clearly shown to release a party from an obligation, in which he has, under his signature, acknowledged the debt, and admitted a consideration. *Hubbard* v. *Griffin*, 383.

9. A resolutory condition is implied in all synallagmatic contracts. *Gustine* v. *Union Bank of Louisiana*, 412.

10. To recover the penalty stipulated to be paid, in case of non-compliance by defendant with a contract to deliver certain articles, plaintiff must prove that defendant was put in default previous to the commencement of suit. C. C. 2122. Putting the defendant *in mora*, is an indispensable pre-requisite to such an action. C. C. 1906. The want of it need not be specially pleaded; nor is the effect of the omission to put defendant in default waived by his setting up any special defence. *Hepp* v. *Commagère*, 524.

11. An actual bankruptcy or *cessio bonorum*, either voluntary or forced, alone has the effect of rendering immediately exigible debts not matured by the lapse of the time stipulated in the contract, or by the happening of the contingency on which the parties agreed that they should become payable. The mere fact of the insolvency of the debtor does not produce such an effect. C. C. 2049. *Funes y Carillo* v. *Bank of United States*, 533.

12. Where a debt is payable at a particular place, a demand by the creditor there, is a condition precedent, and must be made before instituting suit. *Ib.*

COSTS.

1. An appellee cannot, by entering in the Supreme Court a *remittitur* of a sum incorrectly allowed by the court below as special damages, throw the costs of the appeal on the appellant. *Rhodes* v. *Skolfield*, 131.

2. A defendant owes no costs until the final termination of the action, and

then only in case judgment be rendered against him. C. P. 549. Otherwise as to plaintiffs. *Fink* v. *Martin*, 147.

3. A defendant whose property has been sequestered, pending the suit, at the instance of the plaintiff, has a right to have the sequestration set aside, on executing a bond in favor of the plaintiff with the security required by law. C. P. 279. His right to claim possession of the property, is subject to no other condition than that of giving the bond. The sheriff has no right to require from him payment of any of the expenses of the sequestration, before restoring the property. The defendant will be liable therefor, only in case judgment be rendered against him. C. C. 2949. C. P. 283. *Ib.*

COURTS.

1. A Court of Probates has no jurisdiction of any matters in litigation between the surviving spouse and the heirs of the deceased, arising subsequently to the dissolution of the community—particularly of such as may result from the obligations of one of the parties as a *negotiorum gestor*.

Stewart v. *Pickard*, 18.

2. As a general rule, the jurisdiction of the appellate court attaches as soon as the appeal bond is filed, and the lower court has no longer authority to take any steps but such as may be necessary to transmit the record to the Supreme Court, or, by a provisional and conservatory order, to secure the ultimate execution of the judgment of the appellate court. *Fink* v. *Martin*, 147.

3. The decision in *Lewis' Heirs* v. *His Executors et al.* (5 La. 387), that while the judgment or order of a Court of Probates receiving a will and ordering its execution, is unreversed, no other court can declare the will void, or prevent its execution, or examine collaterally into the correctness of the proceedings by which it was admitted to probate, must be understood as relating to cases where the validity of a will is attacked at the time of the order for its execution, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate; and not to actions of revendication in which property is claimed or withheld under a will. Courts of ordinary jurisdiction before whom such actions are brought, must necessarily be competent to decide on the validity of the will thus drawn in question. *Succession of Duplessis*, 193.

CURATOR AD HOC.

Where a curator *ad hoc*, appointed by the court to represent an absent defendant in a revocatory action, omits to except in the lower to the action on the ground of the want of proper parties, the failure to make such parties will be noticed in the appellate court as if it had been specially pleaded below. *Per Curiam:* A curator *ad hoc* cannot be permitted to waive any of the legal rights of the party he represents. *Hyde* v. *Craddick*, 387.

DISCUSSION.

The plea of discussion cannot be opposed to a creditor holding a special mortgage. C. P. 73. C. C. 3367. Nor can a third possessor of property mort

gaged for a debt for which other property is also bound, require that it shall be held liable only for a *pro rata* portion of the debt. Each and every part of property mortgaged is liable for each and every portion of the debt.

Bagley v. *Tate*, 45.

See SURETY, 1. 2. 3. 4.

DONATIONS INTER VIVOS.

1. A partition having been ordered by the Probate Court, of the effects of the community previously existing between the plaintiff and his deceased wife, the former opposed its homologation, claiming to be allowed, as a charge against the community, the price of a slave sold by the father of certain minor heirs of the wife, more than ten years before, under a power of attorney from him, and which price he alleged had never been accounted for. *Per Curiam:* If th value of the slave was intended to be left as a donation in the hands of the person by whom it was sold, the donor cannot revoke it in this way; if as a loan, the action to recover it is prescribed. *Stewart* v. *Pickard*, 18.
2. Persons who have lived in open concubinage, and have not subsequently married, cannot make to each other any donation *inter vivos* of moveables, exceeding one-tenth of the donor's estate, after deducting the debts and charges against it. *Succession of Bousquet*, 143.
3. A donation *propter nuptias* given to the future wife by another than the husband, forms a part of the dowry, unless there be a stipulation to the contrary. Such a donation by the future husband, does not form any part of it. C. C. 2317, 2318. *Gates* v *Legendre*, 74.
4. The wife has no legal or tacit mortgage or privilege on the property of her husband, for the restitution of any donation *propter nuptias*, made to her by the latter. C. C. 2318. *Ib.*
5. The prescription of one year established by art. 1989 of the Civil Code, applies to actions by creditors for the rescision of a contract made in fraud of their rights; not to a suit by creditors holding legal mortgages, to rescind, as to them, a judgment decreeing a general mortgage in favor of the wife on the property of the husband, for the reimbursement of a donation *propter nuptias*, made to her by the latter. *Ib.*

DONATIONS MORTIS CAUSA.

1. Persons who have lived in open concubinage, and have not subsequently married, cannot make to each other any donation *mortis causa* of moveables, exceeding one-tenth of the donor's estate, after deducting the debts and charges against it. *Succession of Bousquet*, 143.
2. Certain slaves were directed to be emancipated by the will of the deceased, and the will was admitted to probate, and an executor qualified, who died without having executed any part of it. No executor was appointed in his place; but the heirs, protesting against the validity of the will, took possession of the property, which they sold, including the slaves ordered to be set free. On an application by a third person to be appointed dative testamentary executor, alleg-

ing that the succession had not been finally administered upon, as the slaves had never been emancipated, which appointment was opposed by the heirs as unnecessary: *Held*, that the facts of the case show no necessity for the appointment of an executor; that the slaves, having been sold and passed into the hands of others, their right to freedom, which has not been impaired by the course pursued by the heirs, must be asserted contradictorily with the persons who purchased them, who are entitled to an opportunity of showing the nullity of the will. *Succession of Duplessis*, 193.

3. The admission of a will to probate, and the order for its execution, are but preliminary proceedings necessary to the administration of the estate; and do not amount to a judgment binding on persons not parties thereto. *Ib.*

4. The decision in *Lewis' Heirs* v. *His Executors et al.* (5 La. 387), that while the judgment or order of a Court of Probates receiving a will and ordering its execution, is unreversed, no other court can declare the will void, or prevent its execution, or examine collaterally into the correctness of the proceedings by which it was admitted to probate, must be understood as relating to cases where the validity of a will is attacked at the time of the order for its execution, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate; and not to actions of revendication in which property is claimed or withheld under a will. Courts of ordinary jurisdiction before whom such actions are brought, must necessarily be competent to decide on the validity of the will thus drawn in question. *Ib.*

5. The will of one who died without legitimate children or descendants, contained the following provision: *J'institue pour ma légataire unique et universelle, ma sœur E. P., lui donnant et lui léguant à ce titre la généralité des biens que je délaisserai à mon déces.* *Held*, that this was an absolute institution of an universal heir, by which the legatee became entitled to the whole estate of the testator, and, after the death of the testator, seized of right of the effects of the succession, without being bound to demand the delivery thereof. C. C. 1599, 1602. *Prevost* v. *Martel*, 512.

6. Art. 1474 of the Civil Code which declares, that where the father disposes in favor of his natural children of the portion permitted by law to be so disposed of by him, he shall dispose of the rest of his property in favor of his legitimate relations, unless he bequeath the rest to some public institution, does not constitute his legitimate relations his forced heirs for the rest of his estate. He is bound to dispose of the rest of his property in favor of his legitimate relations, but he may bequeath it to such of them, one or more, as he may select. *Ib.*

7. Except in the case of accretion from legacies made to several conjointly, as provided for by arts. 1700, 1701 of the Civil Code, the legitimate heirs of a testator will inherit from him only such portion of the succession as may remain undisposed of, either because the testator has not bequeathed it to any legatee or instituted heir, or because the heir or legatee has not been able or willing to accept it. C. C. 1702. Legatees by an universal or particular title, benefit by the failure of the particular legacies which they were bound to dis-

charge (C. C. 1697); and an universal legatee, when he concurs with a forced heir (C. C. 1603), and, *à fortiori*, when he does not, is bound to discharge all the legacies, except in case of reduction. Consequently, where a testator, dying without legitimate descendants, but leaving several brothers and sisters, institutes one of them his universal heir, such universal heir or legatee will be entitled to the benefit resulting from the failure or reduction of the particular legacies, to the exclusion of the other brothers and sisters. *Ib.*

8. Where the instituted heir consents to the execution of the particular legacy, the particular legatee cannot contest the right of the legitimate heirs to attack his legacy as illegal. The unwillingness or refusal of the instituted heir to contest the particular legacy, cannot render it valid; and the particular legatee being incapable of receiving, and the instituted heir unwilling to accept it, the particular legacy remains undisposed of, and must, under article 1702 of the Civil Code, devolve upon the legitimate heirs. *Ib.*

9. A testator, dying without descendants, instituted one of his sisters his universal heir. Another sister and a surviving brother commenced an action against the executor of the deceased, the particular legatees, and the instituted heir, for the purpose of causing the legacies to be declared null. The instituted heir answered, through her attorney in fact, that plaintiffs could not attack the will, as the respondent, being the universal legatee of the testator, was entitled to claim the whole of his estate; averred that the dispositions of the will were legal and valid; and prayed that the petition might be dismissed, and the will maintained in all its parts. *Held*, that the averment of the validity of the will, and the prayer for its execution, do not amount to an acquiescence on the part of the instituted heir, in the illegal dispositions, nor to a consent that the legatees shall take the legacies, notwithstanding their illegality. *Ib.*

10. A testator appointed two persons as his executors, and named two others, A. and B., to replace them, in case of the death or absence of the former, leaving a certain sum to each of those who might discharge the duties of executor. One of the persons first named having died, A. applied to be appointed executor in his place, which was opposed by B., who claimed the appointment. A. obtained a dismissal of his application as in case of non-suit; and a judgment was rendered refusing to appoint B., from which the latter appealed, citing A. as appellee. Pending this appeal, A. renewed his application to the Probate Court, and was appointed executor; and from this judgment no appeal was taken. The first named executor and A. having administered on the estate, afterwards filed a tableau of distribution, by which one of the sums bequeathed to the acting executors was allowed to A., and this tableau was homologated by the Probate Court. A decision being subsequently rendered on the appeal of B., by which the latter was declared to be entitled to the appointment of executor, a rule was taken by him in the Probate Court on A., and on the first named executor, to show cause why the legacy should not be paid to him, B. The rule was made absolute, and the judgmert affirmed on appeal.

Succession of Gourjon, 541.

DOTAL PROPERTY.

See Husband and Wife, 1.

EMANCIPATION OF SLAVES.

Though partial payments have been made to the master by a slave, for the purpose of purchasing his freedom, the latter remains the property of the master, who will continue to be entitled to all his services; and a purchaser, to whom he is afterwards sold, subject to the condition of being emancipated on his paying the supposed balance of his value, will be entitled to all his services until such balance is paid. *Per Curiam:* A slave cannot become partially free; nor can he, until legally and absolutely emancipated, own any property, without the consent of his master. *François* v. *Lobrano*, 450.

EVIDENCE.

I. *When to be Introduced.*
II. *Onus Probandi.*
III. *Interest of Witness.*
IV. *Judicial Records.*
V. *Non-Judicial Records and Copies thereof.*
VI. *Proof of Contracts not in Writing, over Five Hundred Dollars in Value.*
VII. *Parol Evidence.*
VIII. *Admissibility and Sufficiency of Evidence under the Pleadings.*
IX. *Irrelevant Evidence.*
X. *Secondary Evidence.*
XI. *Evidence of Particular Persons.*
1. *Judges.*
2. *Parties.*
3. *Agents.*
4. *Partners.*
XII. *Evidence in Particular Actions.*
1. *Actions on Bills of Exchange and Promissory Notes.*
2. *Petitory Actions.*
3. *Actions of Rescision.*

I. *When to be Introduced.*

1. After the argument has commenced no further evidence can be introduced, but by the consent of both parties. C. P. 484. *Thomas* v. *Kean*, 80.

II. *Onus Probandi.*

2. Defendant sued on a note without date, but bearing interest from a certain

day, pleaded prescription, and the court, assuming that the note was made on the day from which it bore interest, gave judgment in his favor. *Held*, that the court erred in assuming that the note was made on the day from which it bore interest; and that defendant was bound to prove the facts from which relief was sought under the plea of prescription.

3. The defendant purchased from the plaintiff a tract of land and certain shares of bank stock. The land, and a number of slaves on it belonging to the plaintiff were mortgaged to secure the payment of the stock, on which the latter had obtained a loan from the bank. Defendant agreed, as the price of the property, in addition to the payment of a certain sum, to assume the payment of the loan obtained by the plaintiff, and to release the mortgage of the bank on plaintiff's slaves. In an action by plaintiff on notes given for a part of the price, defendant claimed a diminution of the price, on account of a deficiency in the quantity of land sold of more than a twentieth. *Held*, that if the bank stock was of any value to the defendant, its value should be deducted from the whole price before proceeding to fix the ratio of diminution, and that the value to the plaintiff of the release of the mortgage, if capable of being estimated, should be added to the price; that the burden of proving the value of the stock to the defendant, was on the plaintiff; and that the proof of the value to the plaintiff of the release of the mortgage, was on the defendant.

Duplantier v. *Newcomb*, 103.

4. Though no particular form is required for the dedication of land to public use, the positive assent of the owner, and the fact of its being used for the public purposes intended by the appropriation, must, at least, be shown.

Linton v. *Guillotte*, 357.

5. The plea of the general issue, in an action against the endorser of a note, throws upon the plaintiff the burden of proving all the facts necessary to a recovery, to wit: demand of the maker, protest, and notice to the endorser.

Ducros v. *Jacobs*, 453.

6. A plaintiff can neither require the performance, nor recover damages for the non-performance of an agreement, without legal proof of its existence.

Bauduc v. *Conrey*, 466.

7. A party cannot complain of a sale, made by the sheriff, of real property in block, unless it be alleged and proved that she requested the officer to sell it in seperate parts. *Ib.*

8. The general rule is, that he who affirms must prove; but, where a note payable to the payee personally, is on its face not negotiable, and the latter declares, in an agreement with the maker of the same date with the note, that the maker shall be bound to pay the same, only in the event of the payee's complying with two conditions, to wit, not endorsing a certain bond, and performing certain work, and the maker relies on a non-compliance by the payee with the conditions of the agreement, it will, on the principle that a negative cannot be proved, be for the defendant to prove that the payee did endorse the note, and for the plaintiff to establish a compliance with the other condition, to wit, his performance of the work. *Gilmore* v. *Destréhan*, 521.

9. To recover the penalty stipulated to be paid in case of non-compliance by

defendant with a contract to deliver certain articles, plaintiff must prove that defendant was put in default previous to the commencement of suit. C. C. 2122. Putting the defendant *in mora*, is an indispensable pre-requisite to such an action. C. C. 1906. The want of it need not be specially pleaded; nor is the effect of the omission to put defendant in default waived by his setting up any special defence. *Hepp* v. *Commagère*, 524.

III. *Interest of Witness.*

10. In an action by an heir on notes given for the price of real property purchased at the sale of the succession of his ancestor, where security only is asked by the defendants on an allegation of danger of eviction, the vendors of the deceased are competent witnesses to explain facts connected with the title papers, and to prove that they had received the amount of a mortgage appearing to exist in their favor. *Per Curiam:* In a controversy for the land, they could not be heard to support a title derived from themselves, which they would be bound to warrant; but, in a case like this, they can neither gain nor lose by the result of the suit. Their liability as warrantors, in the event of any dispute in relation to the land, is not lessened nor changed by their testimony, nor would the judgment be admissible in their favor. The objection goes rather to their credibility, than to their competency. *Skolfield* v. *Rhodes*, 128.

11. The allegation in an answer that a third person is the real plaintiff in the action, is not sufficient to exclude his testimony.

Henderson v. *Western Marine and Fire Insurance Company*, 164.

12. An insolvent, who had placed on his *bilan* a debt due by him to the plaintiff, will, on the execution of a release to him by the defendant, be a competent witness for the latter, in an action by the plaintiff against him as a dormant partner, to prove that no contract of partnership existed. *Per Curiam:* By the surrender and release the witness became entirely disinterested.

Lacaze v. *Séjour*, 444.

IV. *Judicial Records.*

13. The return of a sheriff stating the manner in which a citation was served, cannot be contradicted by evidence where that officer has not been called on to correct it. *Bank of Louisiana* v. *Elam*, 26.

14. Where a *fi. fa.* and the sheriff's return are produced as evidence of a judicial sale, without opposition, it will be sufficient to prove the sale.

Kohn v. *Byrne*, 113.

15. A party who offers the records of other suits in evidence on the trial in the lower court, is bound to file transcripts of them, at least on being apprized of an appeal, or on being required to do so. Where such transcripts, not having been filed below, could not be included in the record of appeal, the appellant will be entitled to a *certiorari;* and, in case the appellee should not file them after the writ has issued, the case will be remanded for a new trial.

Hyde v. *Craddick*, 387.

V. *Non-Judicial Records and Copies thereof.*

16. Where it does not appear from a paper offered in evidence, purporting to be a copy of an authentic act, that the original was signed by two witnesses, it

cannot be admitted in evidence as the copy of an authentic act. An act is not authentic which wants the signature of either of the witnesses required by article 2231 of the Civil Code. *Thomas* v. *Kean*, 80.

VI. *Proof of Contracts not in Writing, over Five Hundred Dollars in value.*

17. Where the demand exceeds five hundred dollars, the testimony of a single witness, not supported by corroborating circumstances, is insufficient. *Brent* v. *Slack*, 371.

VII. *Parol Evidence.*

18. Defendant having pleaded in reconvention that the plaintiff was indebted to him in a certain sum, as the price of a house and lot, which he had, at her instance, purchased for her, offered the testimony of witnesses to establish those allegations. *Held*, that the evidence being parol, and tending to establish an agency to purchase real estate, was inadmissible. *Breed* v. *Guay*, 35.

19. Where the defendant in an action to recover a sum of money as a loan, avers that the amount was paid to him as earnest on a contract for the purchase of real estate, parol evidence will be admissible to establish the averment. It cannot be excluded, on the ground that it tends to establish a sale of real property. *Bouche* v. *Michel*, 92.

20. Parol evidence is inadmissible to support a claim for conventional interest. The proof must be in writing. *Succession of Peytavin*, 118.

21. Where the petition was deposited in the clerk's office, by the plaintiff's attorney, before the time necessary to prescribe the action had elapsed, but in consequence of the absence of the clerk and deputy clerk from the parish, it could not be filed, nor citation be issued until the time had elapsed, the action will not be prescribed. *Contra non valentem agere, non currit prescriptio.* And parol evidence is admissible to prove the fact of the absence of the clerk and his deputy, which rendered it impossible to institute the suit until the time had elapsed. *Smith* v. *Taylor*, 133.

22. Parol evidence is admissible to show an agency in relation to the sale of slaves, where the object of the evidence is neither to make nor destroy the title thereto, but merely to prove an authority to negotiate as an intermediary between the owner and persons applying to purchase. *Ib.*

23. Parol evidence is inadmissible, on an application for an order of seizure and sale, to strengthen or add to the stipulations in the act of mortgage, or to supply the omission of any stipulation. The evidence must appear on the face of the act itself—not *aliunde*. *Courtney* v. *Andrews*, 180.

24. Where a contract of sale is attacked on the ground of fraud, parol evidence is admissible to prove the allegations of fraud upon which the contract is sought to be annulled, whenever the consent of the complaining party is shown, under the allegations, to have been the consequence of the fraud. But such evidence is inadmissible to establish a verbal agreement of the defendant to transfer real property, and a fraudulent refusal on his part to comply therewith. C. C. 2255, 2256. *Bauduc* v. *Conrey*, 466.

VIII. *Admissibility and Sufficiency of Evidence under the Pleadings.*

25. An allegation, in an action to recover a sum of money, that it was loaned to the defendant, is not supported by proof of a deposit. *Bouche* v. *Michel*, 92.

26. Where in an action by the undertaker on a building contract, there is an allegation in the petition, that "if any alteration was made in the contract, or delay occasioned, it was by the order and consent of the defendant," it is sufficient to authorize the introduction of the testimony of witnesses to prove that the contract was altered with the consent of the defendant. Such evidence would also be admissible to rebut the allegations of the defendant, that the work was not completed within the time specified in, and according to the terms of the contract. *Mathias* v. *Lebret*, 94.

27. In an action for damages for a malicious arrest, evidence is admissible to prove the condition of the apartment in the jail in which the plaintiff was confined. *Driggs* v. *Morgan*, 119.

28. Plaintiff having enjoined the execution of a judgment of a justice of the peace, ordering the delivery of the possession of certain premises to defendant, on the allegation that the justice exceeded his jurisdiction, defendant moved to dissolve the injunction, on the ground that it would appear from a complete record filed by him, of the proceedings before the justice, that he did not exceed his jurisdiction. Plaintiff having objected to the admission in evidence of the record filed by defendant: *Held*, that the defendant having asked that the injunction should be dissolved, not on the face of the petition, but on the allegation that the record produced by him would show that the justice had jurisdiction, the record was the basis of the motion to dissolve, and admissible as such.
Bauduc v. *Conrey*, 407.

IX. *Irrelevant Evidence.*

29. Plaintiff, who had been divorced for adultery from her former husband, and married her paramour in another State, where such marriages are not, as here, forbidden by law, sued her first husband for the property she had brought into marriage, without being authorized or assisted by her second husband. On an exception to her want of authorization, after her second marriage had been proved, she offered in evidence the record of the suit of her first husband against her, and her conviction of adultery, to prove that she could not legally contract a second marriage. *Held*, that the proof of the second marriage given in support of the exception, is sufficient to show that she is under marital authority, and that she cannot be listened to in alleging her incapacity to contract such a marriage here, resulting from her own violation of law.
Knaps v. *Graugnard*, 21.

30. In an action on a policy of insurance against fire, evidence is inadmissible to prove that the loss occurred through the negligence of an agent of the plaintiff. The evidence is irrelevant. *Per Curiam:* The underwriters are answerable for any loss occasioned by the negligence of those in charge of the property insured. Such is the law both of marine and fire insurance. But

the negligence must be unaffected by any fraud or design on the part of the insured. *Henderson* v. *Western Marine and Fire Insurance Company*, 164.

31. In an action on a policy of insurance, effected on account of the plaintiffs by an agent, testimony to prove that the latter, who had a policy for his own benefit on goods in the same building, designedly set fire to the building, is inadmissible, where it is neither alleged nor proved that they were in any way privy to the act. The act can no more affect the plaintiffs than if done by a stranger. A principal is liable civilly for the frauds or misrepresentations of his agent, made in the course of his employment, though he neither authorized, justified, nor participated in his misconduct, nor even knew of it; but the misconduct, or misrepresentation on the part of the agent, must be while acting as such, within the scope of his agency. Nor will the record of a suit between the agent and the defendants, on his own policy, be admissible to prove fraud and false swearing on the part of the plaintiff in the latter suit, or to show what portion of the property insured belonged to the plaintiffs in the action in which it is offered in evidence. The fraud and false swearing on the part of the agent, being in his own case and for his own purposes, was irrelevant; and the principals not being a party to the suit, the matter was *res inter alios acta*, and cannot be used against them. *Ib.*

32. In an action to restrain defendant from selling certain ground, alleged by plaintiff to have been dedicated to public use, a plan of the property published by the former, and a prospectus reciting the conditions on which he proposed to make the dedication, laid before the Council of the city in which the ground is situated, with a view to obtain its co-operation in effecting the dedication, will be admissible in evidence. Any objection to the evidence as irrelevant and not affecting the plaintiff, goes to its effect, not to its admissibility.

Linton v. *Guillotte*, 357.

X. *Secondary Evidence.*

33. The certificate of the Governor, under the great seal of the State, is the best evidence of the official character of one styling himself a judge of one of the courts of the State, by whom a commission to take testimony has been executed. Where such evidence is not produced, nor its absence accounted for, parol evidence that the person acted, to the knowledge of the witness, in the capacity assumed by him, cannot be admitted. *Buford* v. *Johnson*, 456.

XI. *Evidence of Particular Persons.*

1. *Judges.*

34. A judge before whom a cause is being tried, is a competent witness for either party. The act of the 25th March, 1828, sec. 6, provides in what manner he shall be sworn, and how his testimony shall be reduced to writing, if required by either party. *Babin* v. *Nolan*, 373.

2. *Parties.*

35. Where the affidavit of a party, stating the facts which he intends to establish by a witness, is offered to obtain a continuance on account of the absence of the latter, and his opponent, for the purpose of trying the case, admits that the

witness, if present, would swear to the facts stated in the affidavit, and the case is afterwards continued on other grounds, the affidavit and admission cannot be used at any subsequent term. *Driggs* v. *Morgan*, 119.

36. Where a party to a suit is sworn as an ordinary witness at the instance of his opponent, he may state all the circumstances connected with the transaction, though not specially interrogated thereto. No interrogatories having been propounded to him as a party, he is bound to tell the whole truth.

Lyons v. *Flower*, 185.

37. Defendants offered to file a supplemental answer, to which was annexed an affidavit of one of them, detailing the circumstances of a transaction relative to which they desired to interrogate the plaintiff, accompanied with interrogatories requiring him to say whether the facts mentioned in the affidavit were true, and, if not, to state the facts as they occurred. Plaintiff objected to the filing of the answer, on the ground that the interrogatories were not properly propounded: *Held*, that the application to file the answer was correctly rejected, and that the court did not err in requiring the plaintiff to propound separate interrogatories as to the distinct facts, relative to which he intended to question the plaintiff. *Demarest* v. *Ledoux*, 189.

38. The answers of a party to an action, interrogated under art. 2255 of the Civil Code as to a verbal sale of an immovable, denying the sale, cannot be contradicted. *Bauduc* v. *Conrey*, 466.

3. *Agents.*

39. When an agent, by whom insurance has been affected, he being named as agent in the policy, swears to the loss as his, the oath will be considered as referring to the character in which he was recognized and acted when he affected it, and not as proof of perjury.

Henderson v. *Western Marine and Fire Insurance Company*, 164.

40. An agent may be a witness in all cases, except in suits against the principal on account of the negligence of the agent. In such cases, he cannot be a witness for the principal. *Ib.*

41. An agent is a competent witness for his principal, in an action against the latter to recover a sum of money, alleged to have been paid to the agent through error, and admitted to have been paid by him to his principal. The witness is indifferent, being responsible to one or the other party for the amount in controversy. *McDonogh* v. *Delassus*, 489.

4. *Partners.*

42. In an action by the creditor of an insolvent, against a third person as a secret partner of the debtor, the defendant may, on the cross-examination of a witness of the plaintiff's, require him to state any declarations of the insolvent, as to the supposed connection of the latter as a partner with the defendant, made previous to the insolvency. *Per Curiam:* The declarations were part of the *res gestæ*, and made at a time not suspicious. *Lacaze* v. *Séjour*, 444.

XII. *Evidence in Particular Actions.*

1. *Actions on Bills of Exchange and Promissory Notes.*

43. Where the protest of a note and the notary's certificate of notice is offered in

evidence, the opposite party cannot interrogate the notary as to whether the act offered is an original or a copy, and whether the act of record is signed by the witnesses named in the protest. *Per Curiam:* The act of the notary, such as it is presented, must have the effect it is entitled to, without any explanation by witnesses, or being eked out by parol evidence.

Bank of Louisiana v. *Black*, 59.

44. Where a protest offered in evidence in an action against the endorsers of a note, shows on its face that the note was protested in the presence of two witnesses, but that they did not sign that part of it which certifies the demand and refusal to pay, and the certificate attached, showing in what way the notices were served, appears to have been signed in the original by two witnesses, and the notary certifies a copy from his records, it is sufficient. *Ib.*

45. The written proof of notice of protest, provided by the act of 13th March, 1827, does not exclude parol evidence thereof. *Ducros* v. *Jacobs*, 453.

46. The notary by whom the protest was made is a competent witness, in an action against the endorser of a note, to prove notice to the latter. *Ib.*

2. *Petitory Actions.*

47. To recover, in a petitory action, against a party in possession claiming title, the plaintiff must not only show a better title than the defendant's, but a title as good as any which the latter can oppose to him, whether vested in the defendant or not. But the outstanding title in such third person must be legal, subsisting, and better title than the plaintiff's; and, in fairness, should be set forth in the answer, that the plaintiff may have notice thereof.

Williams v. *Riddle*, 505.

3. *Actions of Rescission.*

48. Proof of an offer by the vendor of a slave, made while the parties were in treaty to compromise the difficulties between them, to give the vendee another in place of the one sold to him, will exonerate the purchaser from the necessity of proving, in a redhibitory action, a tender of the slave.

Smith v. *Taylor*, 133.

EXCEPTIONS, BILL OF.

1. Where a bill of exceptions is insufficient to enable the court to test the correctness of the decision of the inferior tribunal, its judgment will be presumed to be correct. *Thomas* v. *Kean*, 80.

2. Where a party desires to oppose the admission of the report of experts, he must object to it when offered, and except to the opinion of the court admitting it. Where this has not been done, no objection to its admission can be urged on a motion for a new trial. *Mathias* v. *Lebret*, 94.

EXECUTION OF JUDGMENT.

1. Neither a married woman, though entitled, in virtue of her general mortgage on the property of her husband, to be paid out of the proceeds in preference to any subsequent creditor, nor any mortgage or other creditor can arrest the sale of property seized under execution, on the mere ground of

having a preference upon its proceeds. Under articles 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, and may claim to have the effect of the seizure regulated as it relates to him, when he asserts a preference on the proceeds of the things seized and sold; and the court may order the amount to be retained by the sheriff, subject to its order. In such a case the sheriff may be enjoined from paying the proceeds to the seizing creditor.

Gil v. *Her Husband*, 28.

2. Irregularities arising subseqent to a judicial sale, such as an irregularity in taking the bond of a purchaser, etc., cannot affect the rights acquired under the sale. But where the subsequent irregularity is rather a continuation of one existing previous to the adjudication, or has been caused by an irregularity in the proceedings previous to the sale, as where the advertisement of a sale at twelve months' credit does not state that the bond is to bear interest from the day of the adjudication at the rate allowed by the judgment, as required by art. 681 of the Code of Practice, and the bond consequently is not taken so as to bear the interest allowed by the judgment on which the execution was issued, the rule that, under a forced alienation of property the purchaser will require no title unless the formalities of the law be strictly complied with, applies, and the sale will be invalid. *Wright* v. *Higginbotham*, 30.

3. Plaintiff's intestate, as assignee of a judgment against four parties, agreed to accept from two of the debtors a title to a tract of land in satisfaction thereof, and gave a receipt on the *fi. fa.* issued on the judgment for its amount in full. The act of sale was prepared and signed by one of the two debtors, but the other died before executing it, and before he had been put in default, and his executor offered to complete the act. In an action to cancel the receipt: *Held*, that by signing the receipt on the *fi. fa.* plaintiff's intestate abandoned his rights thereunder, reserving only what he acquired against the two debtors who contracted to give the title to the land; that one having complied with his obligation, and the other dying without having been put *in mora*, the contract with them cannot be abandoned, and the obligation of the others revived. Judgment in favor of defendants as in case of non suit.

Chapman v. *Hardesty*, 34.

4. A sheriff, by whom real property is about to be sold, is required by law to read a certificate from the recorder of mortgages, showing all the mortgages existing on it; and he should announce that the purchaser is entitled to retain in his hands out of the price of the adjudication, the amount required to satisfy the privileged debts and special mortgages to which it is subject, taking the bond of the latter, when the sale is on credit, only for the surplus. If the bid be insufficient to discharge anterior special mortgages, no adjudication can take place. *McRae* v. *Chapman*, 65.

5. Where the certificate read by the sheriff at the sale of property at twelve months' credit, omits to mention a mortgage in favor of certain prior vendors of the property, and the purchaser is afterwards evicted by them, the bonds of the purchaser will be annulled, as given in error and without consideration. The omission, of itself, is enough to invalidate the adjudication. C. P. 678, 683, 684. C. C. 1813, 1818. *Ib.*

6. According to arts. 683, 684 of the Code of Practice, privileges and special mortgages existing on property offered for sale by sheriffs, in favor of others than the seizing creditor and which are preferred to him, form a part of the price for which it may be sold; and it cannot be sold unless something be offered above their amount. The sheriff is required to announce that the purchaser may retain out of the price offered the amount of such privileged debts and special mortgages. The purchaser is bound to pay the previous incumbrances as a part of the price. If it turn out that a special mortgage or privilege, certified to exist upon the property, had been extinguished, or never attached, as where, in the case of a mortgage to secure against future endorsements, the endorser has never been made liable, the owner himself, or his creditors, in case of a surrender, may recover of the purchaser the amount thus erroneously estimated as a part of the price. *Perry* v. *Halloway* 107.

7. Where property is offered for sale by a sheriff, and he does not comply with the law requiring him to announce the privileges and special mortgages existing on it, so as to make it certain what price the purchaser understood he was to pay, the sale will be null. *Ib.*

8. Property claimed by a plaintiff cannot be alienated pending the action, so as to prejudice his rights. If judgment be rendered in his favor, the sale will be considered as the sale of another's property, and will not prevent his being put in possession by virtue of the judgment. C. C. 2428. *Kohn* v. *Byrne*, 113.

9. Where judgment has been rendered in favor of a party, but with a stay of execution until he shall furnish bond in a fixed sum, with sufficient securities, for the indemnification of the defendant, the latter is not entitled to any notice of the filing of the bond, to give him an opportunity of objecting to its sufficiency, before execution be taken out. The plaintiff is bound, at his peril, to give a sufficient bond. If he fail to do so, his execution may be enjoined; but the party enjoining must take the consequences, if the bond should, upon enquiry, prove sufficient. *Rhodes* v. *Skolfield*, 131.

10. The only property of a debtor having been sold under a *fi. fa.*, the purchaser, after assuming the payment of certain claims, gave a twelve months' bond for the balance coming to the debtor. The conditions of the sale not having been complied with, the property was resold. The purchaser at the first sale having subsequently obtained a judgment against the debtor, seized in the hands of the sheriff the bond given by him to the debter, claiming its amount out of the proceeds of the second sale. The bond was not sold but handed over to him. On a rule taken by the wife of the debtor, under art. 301 of the Code of Practice, to show cause why the proceeds of the sale should not be brought into court, and distributed among the creditors of the defendent in execution, according to their privileges and mortgages: *Held*, that the purchaser at the first sale acquired no title to the bond by its delivery to him; that it remained the property of the defendant in execution, representing the portion of the price supposed to be coming to him; and that neither he, nor the party who pretends to have acquired his rights, can claim its proceeds in opposition to the mortgage creditors of the latter, the defendant in the execution. *Turner* v. *Parker*, 154.

EXECUTOR.

See Successions, III.

EXECUTORY PROCESS.

1. A creditor whose debt is payable in instalments, and secured by mortgage, on the failure of the debtor to pay any instalment, may require the property to be sold for the payment of the whole debt, provided the sale be for cash for so much only as is due, and for the balance on the terms of credit stipulated in the origenal contract. C. P. 686. *Union Bank of Louisiana* v. *Smith*, 49.

2. The effect of the clause *de non alienando* in a mortgage, is to render void, as regards the mortgagee, any alienation or transfer of the property made in violation of the mortgage; and the mortgagee may have the property seized and sold as if no change of owners had taken place, and without making the vendee of the mortgagor a party to the executory proceedings. *Haley* v. *Dubois*, 54.

3. Defendants having sold certain lots of ground to the plaintiff and another person, the purchasers gave their notes for the price, payable at future periods. The notes were identified with the act of sale, and secured by mortgage on the property. The other purchaser having subsequently sold his interest to the plaintiff by an act of sale in which the defendants intervened for the purpese of correcting an error in the description of the property, the notes first given were cancelled, and others were executed by the last purchaser, payable to the defendants, or bearer, for the same amounts and maturing at the same periods as the first. These notes were certified by the parish judge to have been given to secure the purchase money of the property; but no mortgage was reserved to secure their payment. Two of the notes last given having been protested for non payment at maturity, the defendants took out an order of seizure and sale under the act in which a mortgage was reserved in their favor, annexing to their petition therefor the protested notes. On a motion to dissolve: *Held*, that to entitle a party to executory process, as the owner of an act importing a confession of judgment, containing a privilege or mortgage in his favor, it must appear from the act itself, that the debtor has declared or acknowledged therein the debt for which the privilege or mortgage was given; that the order of seizure and sale having been applied for under an act containing no declaration, on the part of the plaintiff, of his being indebted to the defendants in the amount sued for, and the notes annexed to the petition not being mentioned in the act, no executory process could be legally issued thereon; that no such process could be issued under the first sale, as the notes given under it are admitted to have been cancelled; nor under the second, the defendants not being recognized, nor alluded to therein as the creditors of the plaintiff. *Courtney* v. *Andrews*, 180.

4. Parol evidence is inadmissible, on an application for an order of seizure and sale, to strengthen or add to the spitulations in an act of mortgage, or to supply the omission of any stipulation. The evidence must appear on the face of the act itself—not *aliunde*. *Ib.*

EXPERTS.

Where a party desires to oppose the admission of the report of experts, he must

object to it when offered, and except to the opinion of the court admitting it. Where this has not been done, no objection to its admission can be urged on a motion for a new trial. *Mathias* v. *Lebret*, 94.

FIERI FACIAS.

See EXECUTION OF JUDGMENT.

FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS.

Plaintiff having recovered a judgment against the Firemen's Insurance Company of New Orleans, propounded interrogatories to a stockholder, cited as a garnishee, who answered that he had owned certain shares in the company, but had forfeited them under the third section of the charter, before being made garnishee, by failing to pay the balance due on the shares subscribed for by him. He admitted that he had not sold or otherwise disposed of the shares, and had paid but a certain portion of the price of each: *Held*, that the liability of the garnishee resulted from his answer; that the forfeiture of the shares of delinquent stockholders, provided for by the third section of the charter, was a means given to the company to enforce, for its own protection, the payment of the amount subscribed for; that, without the action of the company, the stockholders do not loose their property in their respective shares; that the creditors of the company are entitled to the whole stock for the security of any judgment obtained against the company; and that the company could not by any act of their, to the prejudice of their creditors, liberate any of its stockholders from their obligations to pay the full price of the shares subscribed for by them. *Brode* v. *Firemen's Insurance Company of New Orleans*, 440.

FRAUD.

Questions of fraud and simulation are peculiarly within the province of a jury. *Grant* v. *Hurst*, 422.

See HUSBAND AND WIFE, 5. 10. SALE, 19. 20. 21. 22. 23.

HUSBAND AND WIFE.

I. *Dotal and Paraphernal Property.*
II. *Donations Propter Nuptias.*
III. *Community of Gains.*
IV. *Separation of Property.*
V. *Contracts of Married Woman.*
VI. *Actions by Married Woman.*

I. *Dotal and Paraphernal Property.*

1. The right of a husband on the property of his wife under his administration, is similar to that of the usufructuary; and where the property owned by the wife

at the time of the marriage, consisted of cattle, the rules laid down by art. 586, 587 of the Civil Code, as to the responsibility of the usufructuary, apply to the husband. Thus, where the community is dissolved by the death of the husband, and the cattle brought by the wife into the marriage, are shown to have increased, she will be entitled to claim as her separate property a number equal to that brought by her into marriage. Nor is it necessary that she should identify any of the cattle as those which belonged to her at the time of the marriage. If the whole herd do not die, the husband is bound to make good the number of the dead out of the new born cattle. *Wimbish* v. *Gray*, 46.

2. The wife's mortgage for the reimbursement of her paraphernal property attaches only from the date of the actual receipt of the price by her husband. *Turner* v. *Parker*, 154.

II. *Donations Propter Nuptias.*

3. A donation *propter nuptias* given to the future wife by another than the husband forms a part of the dowry, unless there be a stipulation to the contrary. Such a donation by the future husband, does not form any part of it. C. C. 2317, 2318. *Gates* v. *Legendre*, 74.

4. The wife has no legal nor tacit mortgage or privilege on the property of her husband, for the restitution of any donation *propter nuptias*, made to her by the latter. C. C. 2318. *Ib.*

5. The prescription of one year established by art. 1989 of the Civil Code, applies to actions by creditors for the rescission of a contract made in fraud of their rights; not to a suit by creditors holding legal mortgages, to rescind, as to them, a judgment decreeing a general mortgage in favor of the wife on the property of the husband, for the reimbursement of a donation *propter nuptias* made to her by the latter. *Ib.*

III. *Community of Gains.*

6. The price of a slave who belonged to the husband before the marriage, but was sold by him during its existence, cannot be charged to the community, without proof that the price was employed for its benefit. *Stewart* v. *Pickard*, 18.

7. A partition having been ordered by the Probate Court of the effects of the community previously existing between the plaintiff and his deceased wife, the former opposed its homologation, claiming to be allowed, as a charge against the community, the price of a slave sold by the father of certain minor heirs of the wife, more than ten years before, under a power of attorney from him, and which price he alleged had never been accounted for. *Per Curiam:* If the value of the slave was intended to be left as a donation in the hands of the person by whom it was sold, the donor cannot revoke it in this way; if as a loan, the action to recover it is prescribed. *Ib.*

8. The community of *acquêts* ceases to exist by the death of either spouse. A title to an undivided half of the property vests in the survivor and the heirs of the deceased; and if the former continue in the enjoyment of the common property, he will be bound by the obligations of a *negotiorum gestor*. *Ib.*

9. Art. 2377 of the Civil Code, which provides that when the hereditary property of either of the spouses has been increased or improved during the marriage, the other shall be entitled to one half of the value of such increase or amelioration if proved to have been the result of the common labor or expense, does not contemplate that to ascertain the value of such increase or improvement, every item of improvement shall be estimated separately, and the aggregate amount added to the estimation of the land. This would often be unjust, as the increased value of the property would, in many cases, be far from equal to the original cost of such improvements. *Babin* v. *Nolan*, 373.

IV. *Separation of Property.*

10. The creditors of the husband may contest the validity of a separation of property, though decreed and even executed, when made with a view to defraud them, and they are injured thereby. C. C. 2408. *Gates* v. *Legendre*, 74.

V. *Contracts of Married Woman.*

11. Wherever it is shown that the consideration of the obligation of a married woman, contracted jointly with her husband, enured to her use and benefit, and was not a thing which her husband was bound to furnish her with, she will be bound thereby. She cannot, in such a case, be considered as having bound himself as security for her husband, or conjointly with him for a debt in which, he alone is interested. As where a sum of money, for the repayment of which a note was executed jointly by the husband and wife, was applied to the extinguishment of a debt due by the husband to a minor, which was secured by a general legal mortgage existing on certain property of the husband's at the time of its purchase by the wife. *Per Curiam:* The consideration of the obligation may be viewed as a part of the price of the property purchased by her.
Sowell v. *Cox*, 68.

12. A wife holding the first mortgage on the property of her husband, cannot, by renouncing in favor of others, injure a subsequent mortgagee, by placing before him a larger amount of mortgages than originally existed. Subsequent mortgagees in whose favor she may renounce, transferring to them all her rights, will take her place to the extent of her mortgage, and she will retain her priority over other and inferior mortgagees only for the surplus of her claim, after deducting the claims of those in whose favor she renounced.
Turner v. *Parker*, 154.

VI. *Actions by Married Woman.*

13. Plaintiff, who had been divorced for adultery from her former husband, and married her paramour in another State, where such marriages are not, as here, forbidden by law, sued her first husband for the property she had brought into marriage, without being authorized or assisted by her second husband. On an exception to her want of authorization, after her second marriage had been proved, she offered in evidence the record of the suit of her first husband against her, and her conviction of adultery, to prove that she could not legally contract a second marriage. *Held*, that the proof of the second marriage

given in support of the exception, is sufficient to show that she is under marital authority, and that she cannot be listened to in alleging her incapacity to contract such a marriage here, resulting from her own violation of law.

Knaps v. *Graugnard*, 21.

14. The 6th sec. of art. 298 of the Code of Practice was intended to enable the wife to prevent the husband, pending a suit for a separation of property, from disposing, to her prejudice, of the property held in community, or on which she has a privilege for her dotal rights. In such a case she may obtain an injunction against her husband; but, with regard to his creditors, her remedy, when she seeks only to exercise a right of preference, is pointed out by art. 300 of the same Code, and those under which her third opposition should be conducted. *Gil* v. *Her Husband*, 28.

INJUNCTION.

1. Section 3 of the act of 25 March, 1831, and section 3 of the act of 29 March, 1833, do not authorize the court, on the dissolution of an injunction, to increase the interest, where the original judgment bears interest at ten per cent a year. This principle applies with greater force, where the party enjoining is not the debtor. Whatever else it may be proper to allow, must be in the form of damages. *Whittemore* v. *Watts*, 39.

2. The plaintiff in a suit commenced by injunction to stay an order of seizure and sale, cannot plead in a supplemental petition, filed after the issuing of the injunction, as an offset to the defendant's claim, matters which arose subsequently to the issuing of the injunction, and presented entirely new grounds.

Bagley v. *Tate*, 45.

3. Where the plaintiff, in a petition to enjoin an order of seizure and sale obtained on a mortgage to secure a note, alleges the illegality of the note as the ground of enjoining the sale, the injunction cannot be dissolved on the face of the pleadings. An injunction may be had, whenever it is necessary to preserve the property in dispute pending the suit. *Sowell* v. *Cox*, 68.

4. No allowance can be made on dissolving an injunction, for the fees of counsel employed in defending the suit, where there is no proof that any sum had been actually paid by the defendant. *Rhodes* v. *Skolfield*, 131.

5. Where on the dissolution of an injunction obtained by a party to arrest the execution of a judgment ordering him to deliver possession of certain premises, damages cannot be allowed under the third section of the act of 25 March, 1831, in consequence of their being no judgment on which they can be calculated, the right of the defendant in the injunction to sue for the damages on the injunction bond will be reserved. *Bauduc* v. *Conrey*, 407.

See Husband and Wife, 14.

INSOLVENCY.

1. The cashier of the branch of a bank may, as an act of administration, accept the surrender of a debtor of the bank, and vote for a syndic; but without an express and special authority from the directors, he cannot discharge the in-

solvent. The granting of such a discharge is an act of ownership, and not of administration. C. C. 2965, 2966.

Union Bank of Louisiana v. *Bagley*, 43.

2. The discharge of an insolvent who has made a *cessio bonorum*, granted by the creditors, is not an absolute remission of the debt. It rather releases the person of the debtor, than extinguishes the debt itself, which will continue to exist for any balance not paid out of the assets surrendered. *Ib.*

3. The syndic of the creditors of an insolvent is responsible for the whole proceeds of the sale of the estate, as shown by the *procès-verbal* of the sale. Where credit is claimed for any sum, he must show that he used proper diligence to secure and collect the amount. *Succession of Desorme*, 474.

4. Where the syndic of the creditors of an insolvent pays money without authority from the court, he cannot require that the persons so paid shall be made parties to any proceedings against him, to render him responsible for the sums thus paid. *Ib.*

5. An actual bankruptcy or *cessio bonorum*, either voluntary or forced, alone has the effect of rendering immediately exigible debts not matured by the lapse of the time stipulated in the contract, or by the happening of the contingency on which the parties agreed that they should become payable. The mere fact of the insolvency of the debtor does not produce such an effect. C. C. 2049.

Funes y Carillo v. *Bank of the United States*, 533.

INSURANCE.

1. In an action on a policy of insurance against fire, evidence is inadmissible to prove that the loss occurred through the negligence of an agent of the plaintiff. The evidence is irrelevant. *Per Curiam:* The underwriters are answerable for any loss occasioned by the negligence of those in charge of the property insured. Such is the law both of marine and fire insurance. But the negligence must be unaffected by any fraud or design on the part of the insured.

Henderson v. *Western Marine and Fire Insurance Company*, 164.

2. In an action on a policy of insurance, effected on account of the plaintiffs by an agent, testimony to prove that the latter, who had a policy for his own benefit on goods in the same building, designedly set fire to the building, is inadmissable, where it is neither alleged nor proved that they were in any way privy to the act. The act can no more affect the plaintiffs than if done by a stranger. A principal is liable civilly for the frauds or misrepresentations of his agent, made in the course of his employment, though he neither authorized, justified, nor participated in his misconduct, nor even knew of it; but the misconduct, or misrepresentation on the part of the agent, must be while acting as such, within the scope of his agency. Nor will the record of a suit between the agent and the defendants, on his own policy, be admissible to prove fraud and false swearing on the part of the plaintiff in the latter suit, or to show what portion of the property insured belonged to the plaintiffs in the action in which it is offered in evidence. The fraud and false swearing on the part of the agent, being in his own case and for his own purposes, was irrelevant; and the principals not being a party to the suit, the matter was *res inter alios acta*, and cannot be used against them. *Ib.*

3. Where an agent, by whom insurance had been affected, he being named as agent in the policy, swears to the loss as his, the oath will be considered as referring to the character in which he was recognized and acted when he affected it, and not as proof of perjury. *Ib.*

4. Where defendants, sued on a policy of fire insurance underwritten by them, are shown to have consented that the property damaged by the fire should be sold at auction, the price at which it was sold is a proper criterion by which to estimate the damage of the insured. *Ib.*

5. Where a policy of insurance recites that the "insurers shall not be liable for *mutiny*," the mutiny is but an excepted risk. So, where the language of the policy is "*warranted* free from *insurrection*," it does not create a technical warranty, but only exempts the insurers from liability on account of losses which may be sustained in consequence of an insurrection or mutiny. In common parlance, there is little or no difference between mutiny and insurrection; and the word *warranted* is often used where there is no warranty in fact.

McCargo v. *New Orleans Insurance Company*, 202.

6. The *last* cause of a loss is not necessarily the *proximate* cause. *Ib.*

7. All the consequences naturally flowing from a peril insured against, or incident thereto, are properly attributable to the peril itself. *Ib.*

8. Where the insurers of a cargo of slaves are exempted, by the policy, from the risk of insurrection, and the slaves take possession of the vessel by force, turn her from her course, and enter a foreign port, where they escape, the insurrection must be considered as the cause of the breaking up of the voyage and the insurers will not be liable. *Ib.*

9. In principle there is no difference between a successful insurrection of slaves, who form themselves the subject of the insurance, and a capture by an enemy, which, *prima facie*, amounts to a total loss. *Ib.*

10. Where insurance has been effected on slaves shipped from one port to another, the insurers will not be liable where the usual and necessary precautions in providing irons, and in maintaining security, or in the relative numbers of the whites and slaves have not been observed. In such case, the party is left to his recourse against the owners of the vessel.

McCargo v. *Merchants' Insurance Company of New Orleans*, 334.

11. The seaworthiness of a vessel on whose cargo insurance has been effected, is a condition precedent; and, if not seaworthy at the time of sailing, the policy will not be considered as having ever attached. *Ib.*

12. An insurance of slaves protects the insured against any loss arising from their mutiny and insurrection, unless the peril be expressly excepted or warranted against. The articles of the Civil Code rendering the owners of slaves liable for their offences and quasi-offences (C. C. 2300, &c.), do not apply to such a case, which is governed wholly by the commercial law. *Ib.*

13. Where insurance was made on the cargo of a vessel from one port to another, the policy will attach though the cargo was put on board at another place than that named as the port from which the vessel was to sail, where it is the usage for vessels sailing from the port named, to take in their cargoes at the place at which it was actually received on board. *Ib.*

14. Where a vessel on whose cargo insurance has been effected, stops, in descending a river, at different places, for the purpose of taking in further cargo or passengers, such stoppages will not amount to a deviation, when proved to have been conformable to the usages of the trade, and of no unusual length. *Lockett* v. *Merchants' Insurance Company of New Orleans*, 339.

INTEREST.

1. Section 3 of the act of 25 March, 1831, and section 3 of the act of 29 March, 1833, do not authorize the court, on the dissolution of an injunction, to increase the interest, where the original judgment bears interest at ten per cent a year. This principle applies with greater force, where the party enjoining is not the debtor. Whatever else it may be proper to allow, must be in the form of damages. *Whittemore* v. *Watts*, 39.

2. Payments made by one who owes a debt bearing interest, cannot, without the consent of the creditor, be imputed to the reduction of the capital, while any interest is due. C. C. 2160. *Union Bank of Louisiana* v. *Kindrick*, 51.

3. Parol evidence is inadmissible to support a claim for conventional interest. The proof must be in writing. *Succession of Peytavin*, 118.

4. The legal interest on a sum discounted by a bank, is that established by its charter. C. C. 2895. *Commissioners of the Clinton and Port Hudson Railroad Company* v. *Kernan*, 174.

5. The provision of the 19th section of the act of 1834, relative to the Clinton and Port Hudson Railroad Company, which declares, that the mortgages for stock and loans granted by virtue of that act, shall bear interest at the rate of ten per cent a year, after maturity, until paid, applies only to subscriptions for the part of the stock to be secured by mortgage. Under the charter, eight per cent is the rate of legal interest, arising *ex mora*, on a note given for money loaned. Sect. 8. *Ib.*

6. Under the 17th section of the act of 7th April, 1824, incorporating the Bank of Louisiana, which declares that if the bank "shall, at any time, suspend or refuse payment, in current money of the United States, of any of its notes, bills or obligations, or of any moneys received upon deposit, the holder of any such note, bill or obligation, or the person entitled to demand and receive such moneys, shall be entitled to interest thereon from the time of such suspension or refusal until the same shall be fully paid, at the rate of twelve per cent per annum," the holder of a claim can recover interest at that rate only from the time of a demand, or from the period when the bank was in default, and not from the date of a general suspension of specie payments, without such demand. This section does not apply to claims by a stockholder for dividends due by the bank. It was intended to provide for the public dealing with the bank, and not for the stockholders *inter se*. The legislature never intended to subject the stockholders to such a penalty towards each other, for not paying their dividends in specie. *Bank of Louisiana* v. *Fowler*, 196.

7. Interest will be allowed on debts due by estates administered by curators, executors, or administrators, if the estate be sufficient, from the death of the debtor, if then due, or, from the time of becoming due, if after that event,

though no judicial demand have been made (C. P. 989); but this interest cannot exceed five per cent on debts on which a higher rate has not been stipulated in writing by the terms of the contract. *Succession of Desorme*, 474.

8. Compound interest cannot be recovered, *Ib.*

9. Under the 6th section of the act of 13th March, 1837, requiring executors, administrators, curators, and syndics to render full and fair accounts of their administration, at least once in every twelve months, under pain of dismissal from office, and of being condemned to pay interest at the rate of ten per cent a year on all sums for which they may be responsible, from the expiration of the twelve months, the payment of such interest is a part of the penalty, and necessarily coupled with the removal from office, and one cannot be imposed without the other; and such penalties can be inflicted only in cases which have arisen since the promulgation of the act. *Ib.—Rehearing*, 479.

10. The syndic of a succession found, after an examination of his accounts, to owe a balance to the estate, should be condemned, like a curator or executor, to pay interest thereon, at the rate of five per cent a year, from the date of the judgment. C. P. 1007. *Ib.*

INTERNATIONAL LAW.

1. A vessel on the high seas, in time of peace, engaged in a lawful voyage, is under the exclusive jurisdiction of the State to which her flag belongs; as much so, as if constituting a part of its own domain. If forced by any unavoidable cause into a port of a friendly power, she loses none of the rights appertaining to her on the high seas, but herself and cargo, and the persons on board, with their property, and all the rights incident to their personal relations as established by the laws of the State to which they belong, are placed under the protection which the law of nations extends to the unfortunate under such circumstances. Although the jurisdiction of the nation over the vessel belonging to it is not wholly exclusive; and though, for any unlawful acts committed while in such a situation, by the master, crew, or owners, she and they may be responsible to the laws of the place, yet the local law does not supersede the law of the country to which the vessel belongs, so far as relates to the rights, duties and obligations of those on board. *McCargo* v. *New Orleans Insurance Company*, 202.

2. Where slaves shipped from one port of the United States to another, rise upon the officers of a vessel, and take her into a British port, they will be considered still as slaves, though in a state of insurrection. *Per Curiam:* They did not cease to be the property of their owners, though in a state of insurrection, and though the right of property could not be asserted in a British court, nor enjoyed within the exclusive influence of British laws. *Ib.*

INTERPRETATION.

1. Where a clause in a contract of sale, if interpreted literally, would be contradictory of other parts of the act, and of doubtful meaning, the common intention of the parties, rather than a literal construction of the clause, should determine the interpretation. C. C. 1945. *Ross* v. *Garlick*, 365.

2. Where the language of an agreement is susceptible of two meanings, it must be interpreted in the sense most congruous to the whole contract. C. C. 1947. *Ib.*

JUDGMENT.

1. The creditors of the husband may contest the validity of a separation of property, though decreed and even executed, when made with a view to defraud them, and they are injured thereby. C. C. 2408. *Gates* v. *Legendre*, 74.

2. The prescription of one year established by art. 1989 of the Civil Code, applies to actions by creditors for the recission of a contract made in fraud of their rights; not a suit by creditors holding legal mortgages, to rescind, as to them, a judgment decreeing a general mortgage in favor of the wife on the property of the husband, for the reimbursement of a donation *propter nuptias* made to her by the latter. *Ib.*

3. The notification of the filing of the account and tableau of distribution of an executor, operates as a citation to all persons concerned, creditors as well as legatees; and the homologation of the account and tableau, bars all further enquiry as to all matters included therein. *Succession of Peytavin*, 118.

4. The admission of a will to probate, and the order for its execution, are but preliminary proceedings necessary to the administration of the estate; and do not amount to a judgment binding on persons not parties thereto. *Succession of Duplessis*, 193.

5. The decision in *Lewis' Heirs* v. *His Executors et al.* (5 La. 387), that while the judgment or order of a Court of Probates receiving a will, and ordering its execution, is unreversed, no other court can declare the will void, or prevent its execution, or examine collaterally into the correctness of the proceedings by which it was admitted to probate, must be understood as relating to cases where the validity of a will is attacked at the time of the order for its execution, or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into possession of the estate; and not to actions of revendication in which property is claimed or withheld under a will. Courts of ordinary jurisdiction before whom such actions are brought, must necessarily be competent to decide on the validity of the will thus drawn in question. *Ib.*

6. Plaintiff intervened in a suit in which defendants had attached certain property as belonging to their debtors, claiming it as his, together with "any loss he might sustain by reason of said seizure." There was no other allegation of injury or damage caused by the seizure, nor was evidence offered to prove any. The property was adjudged to the intervenor, but no damages were allowed, nor was any claim for them urged, nor was the cause asked to be remanded to assess them. In a subsequent action by the intervenor for damages sustained by the attachment, and exception *rei judicatæ*: *Held*, that the exception should be overruled; the actions not being the same, nor founded on the same cause of action. C. C. 2245. *Preston* v. *Slocomb*, 361.

7. In an action by a judgment creditor to rescind a sale of property made by his debtor as fraudulent or simulated, the vendee, when not a party to the judg-

ment, may contest the plaintiff's demand in the same manner as the debtor might have done before judgment. C. C. 1971. *Ib.*

8. A judgment obtained against a surety does not change the character of his debt, nor his relation to the principal debtor; and a prolongation of time granted to the latter will release the former, in the same manner as if no judgment had been obtained. The judgment creditor can do no act, whereby the rights or recourse of the surety against the debtor may be destroyed or impaired. If he make a novation, or grant time to the principal debtor, the surety is as effectually discharged, as if the judgment had been satisfied. C. C. 2194, 3022. *Gustine* v. *Union Bank of Louisiana*, 412.

9. A judgment neither creates, adds to, nor detracts from the debt of the party against whom it is rendered. It only declares its existence, fixes its amount, and secures to the creditor the means of enforcing its payment. If the debt create a privilege or tacit mortgage, they exist independently of the judgment. *Ib.*

JURY.

Questions of fraud and simulation are peculiarly within the province of a jury. *Grant* v. *Hurst*, 422.

LETTING AND HIRING.

1. An undertaker who has recovered a judgment for work and labor on a building, but whose contract was never recorded, and who neither prayed for, nor was allowed any privilege by the judgment, acquires no lien on the property or its proceeds. *Turner* v. *Parker*, 154.

2. Where the master receipts for articles to be shipped on his vessel, as in good order, the vessel will be responsible for any damage subsequently discovered, unless clearly proved to have occurred before the delivery. And where he gives a receipt for goods left on the levée, they are as much at the risk of the ship, as if actually on board. *Barrett* v. *Salter*, 434.

3. Where the goods left on the levée to be shipped, are exposed to rain, and the shipper subsequently proposes to the master to ascertain the damage from the exposure, before the voyage, and the latter declines to do so, the vessel will be responsible for any increase of damage resulting from the voyage, and the delay to which the goods are necessarily exposed in the foreign port before they could be examined. *Ib.*

LOAN.

A partition having been ordered by the Probate Court, of the effects of the community previously existing between the plaintiff and his deceased wife, the former opposed its homologation, claiming to be allowed, as a charge against the community, the price of a slave sold by the father of certain minor heirs of the wife, more than ten years before, under a power of attorney from him, and which price he alleged had never been accounted for. *Per Curiam:* If the value of the slave was intended to be left as a donation in the hands of the person by whom it was sold, the donor cannot revoke it in this way; if as a loan, the action to recover it is prescribed. *Stewart* v. *Pickard*, 18.

MINOR.

1. The first section of the act of Congress of 19th August, 1841, establishing a uniform system of bankruptcy, having declared that the benefit of the act shall not be extended to any one owing debts in consequence of a defalcation as a guardian, a tutor, against whom a judgment has been rendered for an amount due to the minors under his care, and who subsequently applied to be declared a bankrupt and was discharged as such, not being protected by the proceedings in bankruptcy, may afterwards appeal from the judgment rendered against him. His assignee should not be made a party to the appeal.

Collins v. *Marshall*, 112.

2. The action by one who has attained majority, against his tutor, for an account of his tutorship, is prescribed by four years, commencing from the day of majority. C. C. 356. *Gourdain* v. *Davenport*, 173.

MORTGAGE.

1. Neither a married woman, though entitled in virtue of her general mortgage on the property of her husband to be paid out of the proceeds in preference to any subsequent creditor, nor any mortgage or other creditor, can arrest the sale of property seized under execution, on the mere ground of having a preference upon its proceeds. Under arts. 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, and may claim to have the effect of the seizure regulated as it relates to him, when he asserts a preference on the proceeds of the things seized and sold; and the court may order the amount to be retained by the sheriff, subject to its order. In such a case the sheriff may be enjoined from paying the proceeds to the seizing creditor. *Gil* v. *Her Husband*, 28.

2. The plea of discussion cannot be opposed to a creditor holding a special mortgage. C. P. 73. C. C. 3367. Nor can a third possessor of property mortgaged for a debt for which other property is also bound, require that it shall be held liable only for a *pro rata* portion of the debt. Each and every part of property mortgaged is liable for each and every portion of the debt.

Bagley v. *Tate*, 45.

3. A creditor whose debt is payable in instalments, and secured by mortgage, on the failure of the debtor to pay any instalment, may require the property to be sold for the payment of the whole debt, provided that the sale be for cash for so much only as is due, and for the balance on the terms of credit stipulated in the original contract. C. P. 686.

Union Bank of Louisiana v. *Smith*, 49.

4. The effect of the clause *de non alienando* in a mortgage, is to render void, as regards the mortgagee, any alienation or transfer of the property made in violation of the mortgage; and the mortgagee may have the property seized and sold as if no change of owners had taken place, and without making the vendee of the mortgagor a party to the executory proceedings.

Haley v. *Dubois*, 54.

5. Where a second mortgagee, to whom the property has been mortgaged to secure him against any liability for certain endorsements made by him for the

mortgagor, claims to be paid by preference over the first mortgagee out of the proceeds of the property sold under the first mortgage, but does not allege, nor prove that he has paid, or become liable to pay any of the notes endorsed by him, his petition must be dismissed.

Hooper v. *Union Bank of Louisiana*, 63.

6. To entitle an inferior mortgagee to be paid, under art. 403 of the Code of Practice, out of the property seized, in preference to one having only a general or legal mortgage, he must prove that the debtor has other property of sufficient value to satisfy the anterior general or legal mortgage.

Sowell v. *Cox*, 68.

7. The wife has no legal or tacit mortgage nor privilege on the property of her husband, for the restitution of any donation *propter nuptias*, made to her by the latter. C. C. 2318. *Gates* v. *Legendre*, 74.

8. The wife's mortgage for the reimbursement of her paraphernal property, attaches only from the date of the actual receipt of the price by her husband.

Turner v. *Parker*, 154.

9. The only property of a debtor having been sold under a *fi. fa.*, the purchaser, after assuming the payment of certain claims, gave a twelve months' bond for the balance coming to the debtor. The conditions of the sale not having been complied with, the property was re-sold. The purchaser at the first sale having subsequently obtained a judgment against the debtor, seized in the hands of the sheriff the bond given by him to the debtor, claiming its amount out of the proceeds of the second sale. The bond was not sold but handed over to him. On a rule taken by the wife of the debtor, under art. 301 of the Code of Practice, to show cause why the proceeds of the sale should not be brought into court, and distributed among the creditors of the defendant in execution, according to their privileges and mortgages: *Held*, that the purchaser at the first sale acquired no title to the bond by its delivery to him; that it remained the property of the defendant in execution, representing the portion of the price supposed to be coming to him; and that neither he, nor the party who pretends to have acquired his rights, can claim its proceeds in opposition to the mortgage creditors of the latter, the defendant in execution. *Ib.*

10. A wife holding the first mortgage on the property of her husband, cannot, by renouncing in favor of others, injure a subsequent mortgagee, by placing before him a larger amount of mortgages than originally existed. Subsequent mortgagees in whose favor she may renounce, transferring to them all her rights, will take her place to the extent of her mortgage, and she will retain her priority over other and inferior mortgages only for the surplus of her claim, after deducting the claims of those in whose favor she renounced. *Ib.*

11. A mortgage for money which the mortgagee contracts to advance at a future time, is valid. C. C. 3259, 3260. *Hubbard* v. *Griffin*, 383.

12. A creditor of a succession, having a special mortgage, may require the sale of the mortgaged property to be made for cash, provided its appraised value be obtained. In this respect his wish must always prevail over that of the other creditors. C. P. 990, 991, 992. C. C. 1163.

Succession of Ogden, 457.

NEW ORLEANS AND CARROLLTON RAIL ROAD COMPANY.

The provision of the 10th section of the act of 1st March, 1836, amending the charter of the New Orleans and Carrollton Rail Road Company which, in consideration of a *bonus*, exempts the company for a certain period, from any liability to be taxed on the part of the State, does not exempt real estate held by the company, in the Second Municipality of New Orleans, from liability for taxes imposed by the municipal authorities. *Second Municipality of New Orleans* v. *New Orleans and Carrollton Rail Road Company*, 187.

NEW ORLEANS, CITY OF.

See NEW ORLEANS AND CARROLLTON RAIL ROAD COMPANY.

NEW ORLEANS, MASTER AND WARDENS OF PORT OF.

The fees allowed to the Master and Wardens of the port of New Orleans, by the act of 17th February, 1821, are, at least when the services for which they are claimed have been actually rendered, not inconsistent with the constitution of United States, nor with the act of Congress of 8th April, 1812, admitting the State of Louisiana into the Union.

Master and Wardens of Port of New Orleans v. *Prats*, 459.

NEW TRIAL.

1. A new trial should be allowed whenever justice requires it.

Wilkins v. *Parish of East Baton Rouge*, 57.

2. Where one sued for damages for a malicious arrest is not shown to have acted through malice, but to have had reasonable grounds to believe that he would succeed in his action, and no attempt was made to disprove the affidavit upon which the arrest was obtained, the case will be remanded for a new trial, where the damages allowed by the jury appear excessive. *Driggs* v. *Morgan*, 119.

NOTICE.

Notice to a former owner as to any matter connected with the property, will be binding on one who subsequently acquires it from him. *Per Curiam:* The latter can have no greater rights than the party from whom he acquired his title.

Linton v. *Guillotte*, 357.

NOVATION.

1. Plaintiff's intestate, as assignee of a judgment against four parties, agreed to accept from two of the debtors a title to a tract of land in satisfaction thereof, and gave a receipt on the *fi. fa.* issued on the judgment for its amount in full. The act of sale was prepared and signed by one of the two debtors, but the other died before executing it, and before he had been put in default, and his executor offered to complete the act. In an action to cancel the receipt: *Held*, that by signing the receipt on the *fi. fa.* plaintiff's intestate abandoned his rights thereunder, reserving only what he acquired against the two debtors who

contracted to give the title to the land; that one having complied with his obligation, and the other dying without having been put *in mora*, the contract with them cannot be abandoned, and the obligation of the others revived. Judgment in favor of defendants as in case of non suit.

Chapman v. *Hardesty*, 34.

2. A twelve months' bond is not a payment of the debt on which the execution was issued. It operates no novation, but leaves the original obligation in force against the debtor; and its proceeds, when brought into court under art. 301 of the Code of Practice, are subject to the rights which the creditors originally had on the property. *Turner* v. *Parker*, 154.

OFFENCES AND QUASI-OFFENCES.

1. A mere trespasser cannot defend himself, by alleging imperfections in the title of a plaintiff which is apparently good. *Stephenson* v. *Goff*, 99.

2. Though a writ of arrest may have been illegally obtained, the clerk who issued it, and the sheriff who executed it in obedience to the mandates of a competent tribunal, cannot be viewed as co-trespassers with the plaintiff in the suit, who alone is responsible for the consequences of the proceeding.

Driggs v. *Morgan*, 119.

3. In an action for damages for a malicious arrest, evidence is admissible to prove the condition of the apartment in the jail in which plaintiff was confined. *Ib.*

4. Where one sued for damages for a malicious arrest, is not shown to have acted through malice, but to have had reasonable grounds to believe that he would succeed in his action, and no attempt was made to disprove the affidavit upon which the arrest was obtained, the case will be remanded for a new trial, where the damages allowed by the jury appear excessive. *Ib.*

5. An insurance of slaves protects the insured against any loss arising from their mutiny and insurrection, unless that peril be expressly excepted or warranted against. The articles of the Civil Code rendering the owners of slaves liable for their offences and quasi-offences (C. C. 2300, &c.), do not apply to such a case, which is governed wholly by the commercial law.

McCargo v. *Merchants Insurance Company of New Orleans*, 334.

OPPOSITION OF THIRD PERSONS.

The 6th section of art. 298 of the Code of Practice was intended to enable the wife to prevent the husband, pending a suit for a separation of property, from disposing of the property held in community, or on which she has a privilege for her dotal rights, to her prejudice. In such a case she may obtain an injunction against her husband; but, with regard to his creditors, her remedy, when she seeks only to exercise a right of preference, is pointed out by art. 300 of the same Code, and those under which her third opposition should be conducted. *Gil* v. *Her Husband*, 28.

OWNERSHIP.

See AGENCY, 1.

PARAPHERNAL PROPERTY.

See HUSBAND AND WIFE, I.

PARTIES.

See APPEAL, II. EVIDENCE, 35, 36, 37, 38. PLEADING, I.

PARTNERSHIP.

1. After the dissolution of a firm none of the former partners can bind the others, nor the firm, without special authority derived from a new contract.

Commercial Bank of Natchez v. *Perry*, 61.

2. Where a bill drawn on a commercial partnership, is accepted, after the dissolution of the firm, by one of the partners, payable at a particular bank, but he is not shown to have been authorized by his former partners to bind the firm, and demand of payment was made only at the bank, no demand having been made of the drawees, the drawer will be discharged. *Ib.*

3. The 14th section of the act of Congress of 19th August, 1841, establishing an uniform system of bankruptcy, which declares "that where two or more persons, who are partners in trade, become insolvent, an order may be made" declaring them bankrupts, "in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and all the separate estate of each of the partners, shall be taken," with certain exceptions, "and that the creditors of the company, and the separate creditors of each partner shall be allowed to prove their respective debts," &c., applies to the case of a partner in an existing partnership. It does not apply where the partnership had been dissolved previously to the application to be declared a bankrupt, made by one of its members who had been charged with the liquidation of the debts of the firm. In such a case the interest of the applicant alone vests in his assignees. *Akin* v. *Oakey*, 410.

4. In an action by the creditor of an insolvent, against a third person as a secret partner of the debtor, the defendant may, on the cross-examination of a witness of the plaintiff's, require him to state any declarations of the insolvent, as to the supposed connection of the latter as a partner with the defendant, made previous to the insolvency. *Per Curiam:* The answer was part of the *res gestæ*, and made at a time not suspicious. *Lacaze* v. *Séjour*, 444.

5. The liability of a secret or dormant partner, depending upon the mere fact of partnership, his name not being announced, and no credit being given to him personally as a supposed member, it is not necessary, in case of his withdrawal, to give any notice thereof to the public. *Ib.*

PAYMENT.

1. The holder of a warrant, drawn by the auditor on the treasurer of a parish, for a certain sum, cannot assign a part of it, without the consent of the parish autho-

rities. The latter are not bound to pay their debts by portions; nor will they be bound, though a draft for the part assigned was accepted by the treasurer, if he was not authorized to do so. *LeBlanc* v. *Parish of East Baton Rouge*, 25.

2. Plaintiff's intestate, as assignee of a judgment against four parties, agreed to accept from two of the debtors a title to a tract of land in satisfaction thereof, and gave a receipt on the *fi. fa.* issued on the judgment for its amount in full The act of sale was prepared and signed by one of the two debtors, but the other died before executing it, and before he had been put in default, and his executor offered to complete the act. In an action to cancel the receipt: *Held*, that by signing the receipt on the *fi. fa.* plaintiff's intestate abandoned his rights thereunder, reserving only what he acquired against the two debtors who contracted to give the title to the land; that one having complied with his obligation, and the other dying without having been put in *mora*, the contract with them cannot be abandoned, and the obligation of the others revived. Judgment in favor of defendants as in case of non suit. *Chapman* v. *Hardesty*, 34.

3. Payments made by one who owes a debt bearing interest, cannot, without the consent of the creditor, be imputed to the reduction of the capital, while any interest is due. C. C. 2160. *Union Bank of Louisiana* v. *Kindrick*, 51.

4 A twelve months' bond is not a payment of the debt on which the execution was issued. It operates no novation, but leaves the original obligation in force against the debtor; and its proceeds, when brought into court under art. 301 of the Code of Practice, are subject to the rights which the creditors originally had on the property. *Turner* v. *Parker*, 154.

PLEADING.

I. *Parties to Actions.*
II. *Actions where to be brought.*
III. *Petition and Amendments thereto.*
IV. *Exceptions and Answer.*
V. *Admissions.*
VI. *Inadmissible Allegations.*
VII. *Interrogatories to a Party.*

1. *Parties to Actions.*

1. Plaintiff, who had been divorced for adultery from her former husband, and married her paramour in another State, where such marriages are not, as here, forbidden by law, sued her first husband for the property she had brought into marriage, without being authorized or assisted by her present husband. On an exception to her want of authorization, after her second marriage had been proved, she offered in evidence the record of the suit of her first husband against her, and her conviction of adultery, to prove that she could not legally contract a second marriage. *Held*, that the proof of the second marriage, given in support of the exception, is sufficient to show that she is under marital authority, and that she cannot be listened to in alleging her incapacity to contract such a marriage here, resulting from her own violation of law.

Knaps v. *Graugnard*, 21.

2. Defendant having made a note in favor of a bank, obtained from the cashier possession of the note and a release from the debt, on substituting another debtor in his place. In an action against the maker to recover the amount of the note, on the ground that the cashier had no authority to release him: *Held*, that plaintiffs were under no obligation to cite the maker of the second note as a party to the suit. *Commissioners of the Clinton and Port Hudson Railroad Company* v. *Kernan—Rehearing*, 176.

3. Certain slaves were directed to be emancipated by the will of the deceased, and the will was admitted to probate, and an executor qualified, who died without having executed any part of it. No executor was appointed in his place; but the heirs, protesting against the validity of the will, took possession of the property, which they sold, including the slaves ordered to be set free. On an application by a third person to be appointed dative testamentary executor, alleging that the succession had not been finally administered upon, as the slaves had never been emancipated, which appointment was opposed by the heirs as unnecessary: *Held*, that the facts of the case show no necessity for the appointment of an executor; that the slaves, having been sold and passed into the hands of others, their right to freedom, which has not been impaired by the course pursued by the heirs, must be asserted contradictorily with the persons who purchased them, who are entitled to an opportunity of showing the nullity of the will. *Succession of Duplessis*, 193.

4. Where a curator *ad hoc*, appointed by the court to represent an absent defendant in a revocatory action, omits to except in the lower court to the action on the ground of the want of proper parties, the failure to make such parties will be noticed in the appellate court as if it had been specially pleaded below. *Per Curiam:* A curator *ad hoc* cannot be permitted to waive any of the legal rights of the party he represents. *Hyde* v. *Craddick*, 357.

5. Plaintiffs, judgment creditors of the former owner of certain real property, instituted a revocatory action against a vendee in possession, praying that the several acts of sale by which the property had been transmitted from their debtor, through successive purchasers, to the defendant, might be annulled as fraudulent, and the property declared to belong to their debtor, and subject to be seized and sold to satisfy their judgments. *Held*, that the object of the action being to annul all the conveyances as fraudulent, the intermediate vendees of the property, should have been made parties to the suit, which cannot be maintained against the defendant alone; and that to succeed in annulling the sale, plaintiffs must show fraud in the original transaction, as well as in the successive sales, including that to the defendant. *Ib.*

6. To maintain a revocatory action to annul a contract for fraud or simulation, it is necessary to make the original debtor a party to the suit, only where the debt has not been previously liquidated by a judgment. C. C. 1970.

Dumas v. *Lefebvre*, 399.

7. One who claims to be the owner of property seized and in the hands of an officer of the court, must apply, by opposition as a third person, to the court from which the order of seizure was issued, directing his proceedings against

the party at whose suit the seizure was made, and not against the sheriff, who is a mere stake-holder. C. P. 397, 398. *Staples* v. *Bouligny*, 424.

8. No judgment can be rendered in an action against a vendor alone, on a prayer "that the plaintiff be put in possession by an undisputed title," where third persons, holding adversely, are not before the court.

Laurans v. *Garnier*, 425.

9. Plaintiff having instituted an action for arrears of rent against *L— & Co.*, citation was served only on one of the parties composing the firm, which was not alleged to have been a commercial one. *Held*, that the action could not be maintained against one of the members alone, as in every suit on a joint contract all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are presumed to have done so (C. C. 2080); that the action being against a partnership, it must be inferred that there are several defendants; that it is enough to show that all the defendants named in the petition were not cited, to entitle those cited to require a dismissal of the action; that the omission to join the proper parties, is not a matter of form, but a matter of law on which the rights of the parties depend; and that the plaintiff could not amend his petition, by substituting the name of the party cited for that of the firm, and proceed with his action. *Dougart* v. *Desangle*, 430.

10. Where the syndic of the creditors of an insolvent pays money without authority from the court, he cannot require that the persons so paid shall be made parties to any proceedings against him, to render him responsible for the sums thus paid. *Succession of Desorme*, 474.

II. *Actions where to be brought.*

11. A bank in liquidation under the act of 14th of March, 1842, cannot be sued before any other court than that under the direction of which it is being liquidated. Sec. 8. *Commissioners of New Orleans Improvement and Banking Company* v. *Citizens Bank of Louisiana*, 14.

III. *Petition and Amendments thereto.*

12. The plaintiff in a suit commenced by injunction to stay an order of seizure and sale, cannot plead in a supplemental petition, filed after the issuing of the injunction, as an offset to the defendant's claim, matters which arose subsequently to the issuing of the injunction, and presented entirely new grounds

Bagley v. *Tate*, 45.

13. Where in an action by the undertaker on a building contract, there is an allegation in the petition, that "if any alteration was made in the contract, or delay occasioned, it was by the order and consent of the defendant," it is sufficient to authorize the introduction of the testimony of witnesses to prove that the contract was altered with the consent of the defendant. Such evidence would also be admissible to rebut the allegations of the defendant, that the work was not completed within the time specified in, and according to the terms of the contract. *Mathias* v. *Lebret*, 94.

14. The vendee of a tract of land cannot maintain an action against his vendor for delivery of the property, where there was no agreement as to a delivery at a particular time, and the petition does not aver that the latter was put *in mora*. C. C. 2461. The law considers the delivery of an immoveable as always accompanying the public act which transfers the property. C. C. 2455.
Laurans v. *Garnier*, 425.

15. A misnomer of the defendants in the petition and affidavit, will be cured by the execution of a bond for the release of the property provisionally seized by the defendants in their real names. *Dougart* v. *Desangle*, 430.

16. An allegation in a petition, that a note was duly protested, is a sufficient averment of demand of payment. A special averment is not absolutely necessary. *Ducros* v. *Jacobs*, 453.

17. A party cannot complain of a sale, made by the sheriff, of real property, in block, unless it be alleged and proved that she requested the officer to sell it in separate parts. *Bauduc* v. *Conrey*, 466.

IV. *Exceptions and Answer.*

18. A mere trespasser cannot defend himself, by alleging imperfections in the title of a plaintiff, which is apparently good. *Stephenson* v. *Goff*, 99.

19. The allegation in an answer that a third person is the real plaintiff in the action, is not sufficient to exclude his testimony. *Henderson* v. *Western Marine and Fire Insurance Company*, 164.

20. The plea of the general issue, in an action against the endorser of a note, throws upon the plaintiff the burden of proving all the facts necessary to a recovery, to wit: demand of the maker, protest, and notice to the endorser.
Ducros v. *Jacobs*, 453.

21. To recover, in a petitory action, against a party in possession claiming title, the plaintiff must not only show a better title than the defendant's, but a title as good as any which the latter can oppose to him, whether vested in the defendant or not. But the outstanding title in such third person must be a legal, subsisting, and better title than the plaintiff's; and, in fairness, should be set forth in the answer, that the plaintiff may have notice thereof.
Williams v. *Riddle*, 505.

22. To recover the penalty stipulated to be paid, in case of non-compliance by defendant with a contract to deliver certain articles, plaintiff must prove that defendant was put in default previous to the commencement of suit. C. C. 2122. Putting the defendant *in mora*, is an indispensable pre-requisite to such an action. C. C. 1906. The want of it need not be specially pleaded; nor is the effect of the omission to put defendant in default waived by his setting up any special defence. *Hepp* v. *Commagère*, 524.

See *Parties to Actions*, 4. *Admissions*, 24. *Inadmissible Allegations*, 25. *Interrogatories to a Party*, 26.

V. *Admissions.*

23. A testator, dying without descendants, instituted one of his sisters his uni-

versal heir. Another sister and a surviving brother commenced an action against the executor of the deceased, the particular legatees, and the instituted heir, for the purpose of causing the legacies to be declared null. The instituted heir answered, through her attorney in fact, that plaintiffs could not attack the will, as the respondent, being the universal legatee of the testator, was entitled to claim the whole of his estate; averred that the dispositions of the will were legal and valid; and prayed that the petition might be dismissed, and the will maintained in all its parts. *Held*, that the averment of the validity of the will, and the prayer for its execution, do not amount to an acquiescence, on the part of the instituted heir, in the illegal dispositions, nor to a consent that the legatees shall take the legacies, notwithstanding their illegality.

Prevost v. *Martel*, 512.

24. An attorney in fact defending an action on behalf of his principal, unless specially empowered, cannot, by any allegations or confessions in the judicial proceedings, renounce or abandon any of the rights of his principal. *Ib.*

VI. *Inadmissible Allegations.*

25. A party cannot allege his own turpitude. *Ross* v. *Garlick*, 365.

VII. *Interrogatories to a Party.*

26. Defendants offered to file a supplemental answer, to which was annexed an affidavit of one of them, detailing the circumstances of a transaction relative to which they desired to interrogate the plaintiff accompanied with interrogatories requiring him to say whether the facts mentioned in the affidavit were true, and, if not, to state the facts as they occurred. Plaintiff objected to the filing of the answer, on the ground that the interrogatories were not properly propounded: *Held*, that the application to file the answer was correctly rejected, and that the court did not err in requiring the plaintiff to propound separate interrogatories as to the distinct facts, relative to which he intended to question the plaintiff. *Demarest* v. *Ledoux*, 189.

PRESCRIPTION.

1. Prescription runs against a note payable on demand, from its date, not from that of the demand. *Per Curiam:* Prescription attaches to a right from the moment that it can be exercised. *Andrews* v. *Rhodes*, 52.

2. Defendant sued on a note without date, but bearing interest from a certain day, pleaded prescription, and the court, assuming that the note was made on the day from which it bore interest, gave judgment in his favor. *Held*, that the court erred in assuming that the note was made on the day from which it bore interest; and that defendant was bound to prove the facts from which relief was sought under the plea of prescription. *Ib.*

3. One holding under a vendor who sells only his right and title to the property, cannot plead prescription. *Thomas* v. *Keen*, 80.

4. A reconventional demand interrupts prescription; and the interruption necessarily continues until the termination of the action. *Driggs* v. *Morgan*, 119.

5. Where the petition was deposited in the clerk's office, by the plaintiff's attorney, before the time necessary to prescribe the action had elapsed, but, in consequence of the absence of the clerk and deputy clerk from the parish, it could not be filed, nor citation be issued until the time had elapsed, the action will not be prescribed. *Contra non valentem agere, non currit prescriptio.* And parol evidence is admissible to prove the fact of the absence of the clerk and his deputy, which rendered it impossible to institute the suit until the time had elapsed. *Smith* v. *Taylor*, 133.

6. The action by one who has attained majority, against his tutor, for an account of his tutorship, is prescribed by four years, commencing from the day of majority. C. C. 356. *Gourdain* v. *Davenport*, 173.

7. Want of sufficient time for advertising between the date of the judgment of a court of Probates ordering the sale of the property of a succession and the sale, is a defect cured by the lapse of five years. It is such an irregularity as the act of 10th March, 1834, relative to advertisements, was made expressly to remedy. See sec. 4. The act applies to proceedings and sales previous to its passage; but the prescription of five years runs only from the date of the act, as to anterior defects and informalities. *Valderes* v. *Bird*, 396.

8. Where a receipt has been given by the master of a steamer, acting as the agent of the owners, for firewood purchased for the use of his boat, the prescription of one year, established by art. 3499 of the Civil Code, against actions for the supply of wood or other things necessary for the construction, equipment, or provisioning of ships, steamers, or other vessels, will cease to run. Such a written acknowledgment places the claim on the footing of an ordinary personal debt, and subjects it to the prescription provided by art. 3508. Where the acknowledgment was tacit, deduced from the acts of the debtor, the nature of the prescription is not changed, but the prescription itself is only interrupted, which will run anew from the date of the interruption. *Davis* v. *Houren*, 402.

PRESUMPTION.

See APPEAL 10.

PRIVILEGE.

1. Neither a married woman, though entitled in virtue of her general mortgage on the property of her husband, to be paid out of the proceeds in preference to any subsequent creditor, nor any mortgage or other creditor, can arrest the sale of property seized under execution, on the mere ground of having a preference upon its proceeds. Under arts. 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, and may claim to have the effect of the seizure regulated as it relates to him, when he asserts a preference on the proceeds of the things seized and sold, and the court may order the amount to be retained by the sheriff, subject to its order. In such a case the sheriff may be enjoined from paying the proceeds to the seizing creditor. *Gil* v. *Her Husband*, 28.

2. The wife has no legal or tacit mortgage nor privilege on the property of her

husband, for the restitution of any donation *propter nuptias*, made to her by the latter. C. C. 2318. *Gates* v. *Legendre*, 74.

3. An undertaker who has recovered a judgment for work and labor on a building, but whose contract was never recorded, and who neither prayed for, nor was allowed any privilege by the judgment, acquires no lien on the property or its proceeds. *Turner* v. *Parker*, 154.

PRISON-BOUNDS BOND.

A prison-bounds bond will be binding, though it do not conform literally to the words of the statute; it is sufficient that it complies with it in substance. Thus, where a bond, instead of being made payable to the sheriff, is made directly to the party for whose benefit it was intended, such an informality cannot prevent the party interested from recovering on it. *Per Cur.* Exemption of the debtor from imprisonment is a legal consideration for the bond; and every engagement entered into for a good and lawful consideration is binding, whatever be its form. *Dunbar* v. *Owens*, 140.

PROHIBITION.

1. N. having obtained an injunction from a District Court to arrest the execution of a writ of possession, issued from a Probate Court, on the ground that no judgment had been rendered under which the writ could be issued, B., by whom the writ had been obtained, moved to dissolve the injunction for reasons apparent on its face. The motion was overruled, and B. answered, pleading the general issue, and averring that a judgment had been rendered under which the writ of possession was issued. While these proceedings were pending, B. applied to the Supreme Court for a writ of prohibition to the judge of the District Court, on the ground that he had exceeded his jurisdiction. *Held*, that no prohibition could be issued, when the very matter for which it is sought to be obtained is denied, and is the main point in litigation, yet untried in the lower court. *Per Curiam:* To grant a prohibition, would be to try the case on its merits, before an appeal. The want of jurisdiction in the District Court does not appear on the face of the petition; and it is not shown that the inferior judge has refused, after being made aware of the existence of a judgment of the Court of Probates, to declare his want of jurisdiction, which depends on the existence of such a judgment.

State v. *Judge of the Fourth District*, 169.

2. The writ of prohibition is an extraordinary one, and should be issued only in cases of great necessity, clearly shown, and where the party has applied, in vain, to the inferior tribunals for relief. *Ib.*

PUBLIC LANDS OF THE UNITED STATES.

Where it is shown that the boundary lines of the land claimed by one holding under a confirmation by the United States and a survey made by a government surveyor, were run as near as possible to a bar, the whole of which was subject to be overflowed at high water, and the greater part of it to an annual overflow, so as to include all the high land susceptible of ownership, the pro-

prietor will be entitled to the alluvion, or batture, subsequently formed on the site of the bar. *Stephenson* v. *Goff*, 99.

PUBLIC THINGS.

Though no particular form is required for the dedication of land to public use, the positive assent of the owner, and the fact of its being used for the public purposes intended by the appropriation, must, at least, be shown.
Linton v. *Guillotte*, 357.

QUASI-CONTRACTS.

1. The community of *acquêts* ceases to exist by the death of either spouse. A title to an undivided half of the property vests in the survivor and the heirs of the deceased; and if the former continue in the enjoyment of the common property, he will be bound by the obligations of a *negotiorum gestor*.
Stewart v. *Pickard*, 18.

2. A Court of Probates has no jurisdiction of any matters in litigation between the surviving spouse and the heirs of the deceased, arising subsequently to the dissolution of the community, particularly of such as may result from the obligations of one of the parties as a *negotiorum gestor*. *Ib.*

3. Where an agent of a third person, believing himself authorized as such to sell certain property of his principal, receives from a purchaser, who also believed that he was authorized to sell, a part of the price, which was paid over to the principal, the purchaser, on discovering the want of authority in the vendor, may recover from the principal the amount so received by him, and this, though a balance may be still due by the agent to the principal, after crediting the former with the amount paid over by him. Art. 2134 of the Civil Code does not apply to such a case. *McDonogh* v. *Delassus*, 481.

QUASI-OFFENCES.

See OFFENCES AND QUASI-OFFENCES.

REDHIBITORY ACTION.

See SALE, 17.

REVOCATORY ACTION.

See SALE. V.

RULE TO SHOW CAUSE.

A judgment in favor of B. against L. having been affirmed on appeal, the former, under the act of 1839, propounded interrogatories to S. & J., who had been L.'s security on his appeal bond, who answered that they were not indebted to the latter, but had in their possession effects belonging to him, deposited with them as collateral security against any liability they might be subjected to as his factors, or securities, &c. T., a creditor of B.'s, having attached the judgment in favor of the latter, against whom he had not yet obtained judgment, took a

rule in his suit against B., on the latter, on L., and on S. & J., to show cause why the effects mentioned in the answer of S. & J. to the interrogatories propounded in the first suit, should not be delivered to the sheriff to be sold, and the proceeds applied to the satisfaction of the judgment in favor of B., but deposited in court subject to its future order. *Held*, that S. & J. could not be proceeded against by a rule taken in the suit against B., to which they were strangers; and that, had they been made garnishees therein, no judgment could be obtained against them, before judgment had been rendered against B., and then only as to the effects belonging to the latter; and that the effects in their hands belonged to L., not to the debtor of T. *Lynch* v. *Barr*, 136.

SALE.

I. *Requisites of the Contract of Sale, and of the Proof and Interpretation thereof.*
II. *Obligations of Vendor.*
III. *Obligations of Vendee.*
IV. *Reduction of Price.*
V. *Rescission.*
VI. *Judicial, and other Public Sales.*

1. *Requisites of the Contract of Sale, and of the Proof and Interpretation thereof.*

1. A purchaser of moveable property, cautioned against buying on the ground that the vendor had no authority to sell, cannot invoke the presumption of ownership resulting from the possession of his vendor. He will be liable to the owner for the value of the articles purchased. *Allen* v. *Hart*, 55.
2. Property claimed by a plaintiff cannot be alienated pending the action, so as to prejudice his rights. If judgment be rendered in his favor, the sale will be considered as the sale of another's property, and will not prevent his being put in possession by virtue of the judgment. C. C. 2428. *Kohn* v. *Byrne*, 113.
3. Parol evidence is admissible to show an agency in relation to the sale of slaves, where the object of the evidence is neither to make nor destroy the title thereto, but merely to prove an authority to negotiate as an intermediary between the owner and persons applying to purchase. *Smith* v. *Taylor*, 133.
4. Where a clause in a contract of sale, if interpreted literally, would be contradictory of other parts of the act and of doubtful meaning, the common intention of the parties, rather than a literal construction of the clause, should determine the interpretation. C. C. 1945. *Ross* v. *Garlick*, 365.
5. Though partial payments have been made to the master by a slave, for the purpose of purchasing his freedom, the latter remains the property of the master, who will continue to be entitled to all his services; and a purchaser, to whom he is afterwards sold, subject to the condition of being emancipated on his paying the supposed balance of his value, will be entitled to all his services until such balance is paid. *Per Curiam:* A slave cannot become

partially free; nor can he, until legally and absolutely emancipated, own any property, without the consent of his master. *François* v. *Lebranc*, 450.

6. The answers of a party to an action, interrogated, under art. 2255 of the Civil Code, as to a verbal sale of an immovable, denying the sale, cannot be contradicted. *Bauduc* v. *Conrey*, 466.

7. A plaintiff can neither require the performance, nor recover damages for the non-performance of an agreement, without legal proof of its existence *Ib.*

II. *Obligations of Vendor.*

8. A vendor is bound to explain himself clearly as to the extent of his obligations; and the exhibition of a sample implies a warranty, that the thing sold by it shall, in general, conform thereto. C. C. 2449. Any secret or hidden defects must be declared, or he who conceals them will be bound to indemnify the party imposed on by such concealment. So the vendor will be bound to indemnify the purchaser, though the inferiority of the thing sold result from the acts of his agent, without his knowledge or consent; and the measure of damages is the difference between the price given, and that which would have been given, had there been no deception. But where both the vendors, and the purchasers, or their agents, whose knowledge is binding on them, know what the probable hidden defects are, the former are not bound to indemnify the latter; as where cotton brought from certain sections of country, is known not to be of uniform quality throughout the bale, and the notoriety of the fact lowers the price which it commands in the market, the mere fact that the quality was not equal throughout, unaccompanied with any proof of fraud will not render the vendors liable to the purchaser. *Clarke* v. *Lockhart*, 5.

9. A purchaser evicted from the property, has a right to recover from his vendor the price paid to him. *Laizer* v. *Generes*, 178.

10. A purchaser, being a possessor *bona fide*, against whom a judgment of eviction has been obtained, is entitled to be reimbursed whatever has been expended by him in useful improvements (C. C. 2485); and he has a right to retain the property until repaid. C. C. 3416. But the value of the improvements should be demanded from the party seeking to evict him, and the premises should not be abandoned until it is reimbursed. Where the purchaser leaves the property before being paid, or being sued, he cannot recover the value of the improvements from his vendor. *Ib.*

11. Defendants, money brokers, having purchased a treasury note of the United States, at a certain rate, resold it to the plaintiff at a small advance. On previous sales of similar notes to plaintiff, defendants had always refused to guaranty or endorse them, and no such guarantee or endorsement was asked, or expressly give, or refused on this sale. The note being proved to have been cancelled, and put in circulation by one who had stolen it, in an action by plaintiff to recover of defendants the amount paid for it: *Held*, tha the latter were bound to refund the amount; that a vendor is always presumed to guaranty the genuineness of the paper he sells, or that anything else which he offers is really what he pretends it to be; and that his liability in this respect, if it can in any case be excluded, can be so only when expressed in the most positive manner. *Michel* v. *Valentine*, 404.

12. It is only where an entire failure or want of title on the part of the vendor is shown, that a purchaser is entitled to recover the price paid, without eviction, and without any previous proceedings, jointly with the vendor, to obtain possession. *Laurans* v. *Garnier*, 425.

13. The vendee of a tract of land cannot maintain an action against his vendor for delivery of the property, where there was no agreement as to delivery at a particular time, and the petition does not aver that the latter was put *in mora*. C. C. 2461. The law considers the delivery of an immovable as always accompanying the public act which trnsfers the property. C. C. 2455. *Ib.*

14. Where an agent of a third person, believing himself authorized as such to to sell certain property of his principal, receives, from a purchaser who also believed that he was authorized to sell, a part of the price, which was paid over to the principal, the purchaser, on discovering the want of authority in the agent may recover from the principal the amount so received by him, and this, though a balance may still be due by the agent to the principal, after crediting the former with the amount paid over by him. Art. 2134 of the Civil Code does not apply to such a case. *McDonogh* v. *Delassus*, 481.

III. *Obligations of Vendee.*

15. Notice to a former owner, as to any matter connected with the property, will be binding on one who subsequently acquires it from him. *Per Curiam:* The latter can have no greater rights than the party from whom he acquired his title. *Linton* v. *Guillotte*, 357.

IV. *Reduction of Price.*

16. The defendant purchased from the plaintiff a tract of land and certain shares of bank stock. The land, and a number of slaves on it belonging to the plaintiff, were mortgaged to secure the payment of the stock, on which the latter had obtained a loan from the bank. Defendant agreed, as the price of the property, in addition to the payment of a certain sum, to assume the payment of the loan obtained by the plaintiff, and to release the mortgage of the bank on plaintiff's slaves. In an action by plaintiff on notes given for a part of the price, defendant claimed a diminution of the price, on account of a deficiency in the quantity of land sold of more than a twentieth. *Held*, that if the bank stock was of any value to the defendant, its value should be deducted from the whole price before proceeding to fix the ratio of diminution, and that the value of the plaintiff of the release of the mortgage, if capable of being estimated, should be added to the price; that the burden of proving the value of the stock to the defendant, was on the plaintiff; and that the proof of the value to the plaintiff of the release of the mortgage, was on the defendant.
Duplantier v. *Newcomb*, 103.

V. *Rescission.*

17. Proof of an offer by the vendor of a slave, made while the parties were in treaty to compromise the difficulties between them, to give the vendee another in place of the one sold to him, will exonerate the purchaser from the necessity of proving, in a redhibitory action, a tender of the slave.
Smith v. *Taylor*, 133.

18. A purchaser, not aware of the defects in his title, being a possessor in good faith, is bound to account for the fruits of the thing sold, only from the commencement of a suit for the recovery of the property. C. C. 495, 3416. *Laizer* v. *Generes*, 178.

19. Plaintiffs, judgment creditors of the former owner of certain real property, instituted a revocatory action against a vendee in possession, praying that the several acts of sale by which the property had been transmitted from their debtor, though successive purchasers, to the defendant, might be annulled as fraudulent, and the property declared to belong to their debtor, and subject to be seized and sold to satisfy their judgments. *Held*, that the object of the action being to annul all the conveyances as fraudulent, the intermediate vendees of the property, should have been made parties to the suit, which cannot be maintained against the defendant alone; and that to succeed in annulling the sale, plaintiffs must show fraud in the original transaction, as well as in the successive sales, including that to the defendant. *Hyde* v. *Craddick*, 387.

20. To maintain a revocatory action to annul a contract for fraud or simulation, it is necessary to make the original debtor a party to the suit, only where the debt has not been previously liquidated by a judgment. C. C. 1970. *Dumas* v. *Lefebvre*, 399.

21. In an action by a judgment creditor to rescind a sale of property made by his debtor as fraudulent and simulated, the vendee, when not a party to the judgment, may contest the plaintiff's demand in the same manner as the debtor might have done before judgment. C. C. 1971. *Ib.*

22. Where a judgment has been rendered in favor of the plaintiffs, in a revocatory action to rescind a sale on the ground of fraud and simulation, and the vendor alone appeals from the decision, the vendee must be cited as an appellee, or the correctness of the judgment cannot be inquired into, and the appeal must be dismissed. So the latter should be made an appellee, where the judgment having been against the plaintiffs, the latter appealed. *Ib.*

23. Where a contract of sale is attacked on the ground of fraud, parol evidence is admissible to prove the allegations of fraud upon which the contract is sought to be annulled, whenever the consent of the complaining party is shown, under the allegations, to have been the consequence of the fraud. But such evidence is inadmissible to establish a verbal agreement of the defendant to transfer real property, and a fraudulent refusal on his part to comply therewith. C. C. 2255, 2256. *Bauduc* v. *Conrey*, 466.

See *Obligations of Vendor*, 9.

VI. *Judicial, and other Public Sales.*

24. Neither a married woman, though entitled, in virtue of her general mortgage on the property of her husband, to be paid out of the proceeds in preference to any subsequent creditor, nor any mortgage or other creditor, can arrest the sale of property seized under execution, on the mere ground of having a preference upon its proceeds. Under arts. 396, 401 and 403 of the Code of Practice, a third person may oppose the payment of the price to the seizing creditor, and may claim to have the effect of the seizure regulated as it re

lates to him, when he asserts a preference on the proceeds of the things seized and sold; and the court may order the amount to be retained by the sheriff, subject to its order. In such a case the sheriff may be enjoined from paying the proceeds to the seizing creditor. *Gil* v. *Her Husband*, 28.

25. Irregularities arising subsequent to a judicial sale, such as an irregularity in taking the bond of a purchaser, etc., cannot affect the rights acquired under the sale. But where the subsequent irregularity is rather a continuation of one existing previous to the adjudication, or has been caused by an irregularity in the proceedings previous to the sale, as where the advertisement of a sale at twelve months' credit does not state that the bond is to bear interest from the day of the adjudication at the rate allowed by the judgment, as required by art. 681 of the Code of Practice, and the bond consequently is not taken so as to bear the interest allowed by the judgment on which the execution was issued, the rule that under a forced alienation of property the purchaser will acquire no title unless the formalities of the law be strictly complied with applies, and the sale will be invalid. *Wright* v. *Higginbotham*, 30.

26. A sheriff, by whom real property is about to be sold, is required by law to read a certificate from the recorder of mortgages, showing all the mortgages existing on it; and he should announce that the purchaser is entitled to retain in his hands out of the price of the adjudication, the amount required to satisfy the privileged debts and special mortgages to which it is subject, taking the bond of the latter, when the sale is on a credit, only for the surplus. If the bid be insufficient to discharge anterior special mortgages, no adjudication can take place. *McRae* v. *Chapman*, 65.

27. Where the certificate read by the sheriff at the sale of property at twelve months credit, omits to mention a mortgage in favor of certain prior vendors of the property, and the purchaser is afterwards evicted by them, the bonds of the purchaser will be annulled, as given in error and without consideration. The omission, of itself, is enough to invalidate the adjudication. C. P. 678, 683, 684. C. C. 1813, 1818. *Ib.*

28. A purchaser at a sheriff's sale, made on twelve months' credit, under an execution in the name of the liquidating commissioners of an insolvent corporation against one of its debtors, cannot tender to the sheriff in payment or compensation of his bid, an obligation of the company. If he refuse to pay the price, or to offer the proper sureties, the sheriff must expose the thing seized to a second sale. C. P. 689. *Felps* v. *Commissioners of the Clinton and Port Hudson Railroad Company*, 89.

29. According to arts. 683, 684 of the Code of Practice, privileges and special mortgagees existing on property offered for sale by sheriffs, in favor of others than the seizing creditor and which are preferred to him, form a part of the price for which it may be sold; and it cannot be sold unless something be offered above their amount. The sheriff is required to announce that the purchaser may retain out of the price offered the amount of such privileged debts and special mortgages. The purchaser is bound to pay the previous incumbrances as a part of the price. If it turn out that a special mortgage or privilege, certified to exist upon the property had been extinguished, or never

attached, as where, in the case of a mortgage to secure against future endorsement, the endorser has never been made liable, the owner himself, or his creditors, in case of a surrender, may recover of the purchaser the amount thus erroneously estimated as a part of the price. *Perry* v. *Holloway*, 107.

30. Where property is offered for sale by a sheriff, and he does not comply with the law requiring him to announce the privileges and special mortgages existing on it, so as to make it certain what price the purchaser understood he was to pay, the sale will be null. *Ib.*

31. Where a *fi. fa.* and the sheriff's return are produced as evidence of a judicial sale, without opposition, it will be sufficient to prove the sale.

Kohn v. *Byrne*, 113.

32. Where property purchased by an heir at a probate sale of the succession of his mother, is resold at the risk of the purchaser on his failure to comply with the terms of the sale, and the notes given for the price by a purchaser at the second sale, are included in the active mass of the community, and the first purchaser subsequently receives his portion of the estate, he thereby ratifies the second sale, and renounces all right under the first adjudication. If the first purchaser was not put in default before the second sale, the only effect of the omission would be to defeat any claim against him for the deficiency, if the property brought less at the second sale. *Sholfield* v. *Rhodes*, 128.

33. A twelve months' bond is not a payment of the debt on which the execution was issued. It operates no novation, but leaves the original obligation in force against the debtor; and its proceeds, when brought into court under art. 301 of the Code of Practice, are subject to the rights which the creditors originally had on the property. *Turner* v. *Parker*, 154.

34. A purchaser of property sold under a *fi. fa.* having applied for a monition under the act of 10 March, 1834, the judgment creditor opposed the homologation of the sale, on the ground that the property had been incorrectly described both in the execution and the advertisement. The property was described as bounded on one side by *Clement* street, instead of *Chestnut* street, the real boundary. There was no such street as Clement street; and the description was, in other respects, accurate. *Held*, that the description being, in other respects. sufficiently accurate to indicate the extent and location of the property, the error, which was clearly a mistake made by the sheriff in copying the description, was immaterial, and could neither invalidate the sheriff's sale, nor support an opposition to its homologation under a monition taken out in pursuance of the act of 1834. *Ogilvie* v. *Rillieux*, 363.

35. Where a formal decree of a court of Probates, recognizing the necessity of selling the property inherited by minors, for the payment of the debts of the succession, was rendered after giving an opportunity to the attorney of the absent heirs to show that no such necessity existed, a purchaser of the property will not be bound to look beyond the decree. *Valderes* v. *Bird*, 396.

36. Where the sale of the property of a succession is made for the payment of debts, it may be sold for less than the appraised value. *Ib.*

37. Want of sufficient time for advertising between the date of the judgment of a court of Probates ordering the sale of the property of a succession and the

sale, is a defect cured by the lapse of five years. It is such an irregularity as the act of 10 March, 1834, relative to advertisements, was made expressly to remedy. See sect. 4. The act applies to proceedings and sales previous to its passage; but the prescription of five years runs only from the date of the act, as to anterior defects and informalities. *Ib.*

38. A party cannot complain of a sale, made by the sheriff, of real property, in block, unless it be alleged and proved that she requested the officer to sell it in separate parts. *Bauduc* v. *Conrey*, 466.

SEQUESTRATION.

1. A defendant whose property has been sequestered, pending the suit, at the instance of the plaintiff, has a right to have the sequestration set aside, on executing a bond in favor of the plaintiff with the security required by law. C. P. 279. His right to claim possession of the property, is subject to no other condition than that of giving bond. The sheriff has no right to require from him payment of any of the expenses of the sequestration, before restoring the property. The defendant will be liable therefor, only in case judgment be rendered against him. C. C. 2949. C. P. 283.

Fink v. *Martin*, 147.

2. Where a plaintiff who has obtained a judgment below, in a case pending before the Supreme Court on a suspensive appeal, represents that his judgment has been recorded in the mortgage office, and swears that he apprehends that the defendant will conceal, or dispose of, pending the appeal, a slave, on whom he has a mortgage resulting from the recording of the judgment, he may obtain a sequestration from the lower court. C. P. 275. Act 7th April, 1826, sec. 9. The appellee is not confined to his recourse on the surety in the appeal bond. *Ib.*

SHIPPING.

1. Where the master receipts for articles to be shipped on his vessel, as in good order, the vessel will be responsible for any damage subsequently discovered, unless clearly proved to have occurred before the delivery. And where he gives a receipt for goods left on the levée, they are as much at the risk of the ship, as if actually on board. *Barrett* v. *Salter*, 434.

2. Where the goods left on the levée to be shipped, are exposed to rain, and the shipper subsequently proposes to the master to ascertain the damage from the exposure, before the voyage, and the latter declines to do so, the vessel will be responsible for any increase of damage, resulting from the voyage, and the delay to which the goods are necessarily exposed in the foreign port before they could be examined. *Ib.*

ST. CHARLES HOTEL COMPANY.

The act of 25th March, 1844, incorporating the St. Charles Hotel Company, is not inconsistent with any provision of the constitution of the State, or of the United States. It does not impair the obligation of any contract, nor destroy any vested right; nor did the legislature, in its enactment, exercise any other than

legislative power. *Mudge* v. *Commissioners of Exchange and Banking Company*, 461.

STATUTES, CITED, EXPOUNDED, &c.

I. *Statutes of the United States.*
II. *Statutes of the State.*

I. *Statutes of the United States.*

1812, April 8. Admitting Louisiana into the Union. *Master and Wardens of Port of New Orleans* v. *Prats*, 459.

1841, August 19. Bankruptcy. *Collins* v. *Marshall*, 112. *Blanc* v. *Banks*, 115. *Flower* v. *Dubois*, 191. *Akin* v. *Oakey*, 410.

II. *Statutes of the State.*

1805, March 31. Fees of Master and Wardens of Port of New Orleans. *Master and Wardens of Port of New Orleans* v. *Prats*, 459.

——, May 4. s. 16. Burglary. *State* v. *Hébert*, 41.

——— s. 39. Costs of conviction in criminal prosecutions. *Staples* v. *Bouligny*, 424.

1807, March 31, s. 13. Bail. *State* v. *Hébert*, 41.

1808, ——— 25, s. 13. Prison-bounds bond. *Dunbar* v. *Owens*, 139.

1813, February 10, s. 13. Supreme Court—judgments to be rendered by. *Dougart* v. *Desangle*, 430,

——, March 27. State taxes. *Second Municipality of New Orleans* v. *New Orleans and Carrollton Rail Road Company*, 187.

——— 28, s. 18. Clerks and sheriffs fees. *Fink* v. *Martin*, 147.

1814, ——— 7, s. 3. ——— *Ib.*

1818, ——— 20, s. 4. Burglary. *State* v. *Hébert*, 41.

1819, ——— 3. Lease. *Bauduc* v. *Conrey*, 407.

1821, February 17. Fees of Master and Wardens of Port of New Orleans. *Master and Wardens of Port of New Orleans* v. *Prats*, 459.

1824, April 7, s. 17. Incorporating the Bank of Louisiana. *Bank of Louisiana* v. *Fowler*, 196.

1826, ——— s. 9. Sequestration. *Fink* v. *Martin*, 147.

1827, March 13. Protest of Bills and Notes. *Union Bank of Louisiana* v. *Black*, 59. *Ducros* v. *Jacobs*, 453.

1828, ——— 25, s. 6. Evidence of judges how to be taken. *Babin* v. *Nolan*, 373.

——— s. 25. Repealing certain laws existing before promulgation of Civil Code and Code of Practice. *Dougart* v. *Desangle*, 430.

1831, March 25, s. 3. Injunction. *Whittemore* v. *Watts*, 39. *Bauduc* v. *Conrey*, 407.

1833, February 7. Clinton and Port Hudson Rail Road Company. *Commissioners of Clinton and Port Hudson Rail Road Company* v. *Kernan*, 174.

——, March 26. Clinton and Port Hudson Rail Road Company. *Ib.*

——— 29, s. 3. Injunction. *Ib.*

1834, March 10. Clinton and Port Hudson Rail Road Company. *Commissioners of Clinton and Port Hudson Rail Road Company* v. *Kernan*, 174.
———— Assurance of titles of purchasers at judicial sales. *Ogilvie* v. *Rillieux*, 363.
———— s. 4. Prescription as to informalities in public sales. *Valderes* v. *Bird*, 396.
1835, February 9. Clinton and Port Hudson Rail Road Company. *Commissioners of Clinton and Port Hudson Rail Road Company* v. *Kernan*, 174.
1836, January 11. Clinton and Port Hudson Rail Road Company. *Ib.*
——, March 1. New Orleans and Carrollton Rail Road Company. *Second Municipality of New Orleans* v. *New Orleans and Carrollton Rail Road Company*, 187.
1837, February 15. Clinton and Port Hudson Rail Road Company. *Commissioners of Clinton and Port Hudson Rail Road Company* v. *Kernan*, 174.
———— 28. Authentication of foreign documents. *Andrews* v. *Chapman*, 188.
——, March 13, s. 6. Accounts of executors, administrators, curators and syndics. *Succession of Desorme*, 474, 479.
1838, —— 10. Charter of Firemen's Insurance Company of New Orleans. *Brode* v. *Firemen's Insurance Company of New Orleans*, 440.
1839, —— 20, s. 13. Interrogatories to third persons under a *fi. fa.* *Lynch* v. *Burr*, 136.
———— s. 20. Appeal. *Fink* v. *Martin*, 147. *Flower* v. *Dubois*, 191.
———— 28. Clinton and Port Hudson Rail Road Company. *Commissioners of Clinton and Port Hudson Rail Road Company* v. *Kernan*, 174.
1840, —— 28. Abolishing imprisonment for debt. *Thornhill* v. *Christmas*, 543.
———— Act supplementary to act abolishing imprisonment for debt. *Ib.*
1842, March 14. Liquidation of banks. *Mudge* v. *Commissioners of Exchange and Banking Company of New Orleans*, 460.
———— s. 8. Liquidation of banks. *Commissioners of New Orleans Improvement and Banking Company* v. *Citizens Bank of Louisiana*, 14.
———— 26. Liquidation of banks *Ib.*
1843, March 22, s. 1. Appeal. *McCollam* v. *Police Jury of Pointe Coupée*, 20.
——, April 5. Liquidation of banks. *Felps* v. *Commissioners of Clinton and Port Hudson Rail Road Company*, 89.
———— 6. Liquidation of Banks. *Ib.*
1844, March 25. Incorporating St. Charles Hotel Company. *Mudge* v. *Commissioners of Exchange and Banking Company of New Orleans*, 460.

STOCKHOLDER.

See FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS.

SUCCESSIONS.

I. *Jurisdiction in matters of Succession.*
II. *Probate of Will.*
III. *Of Executors, Administrators, Curators and Syndics.*
IV. *Claims against Successions.*
V. *Sale of Property of Successions.*
VI. *Of Heirs and Legatees.*
VII. *Tableau of Distribution.*

I. *Jurisdiction in matters of Succession.*

1. A Court of Probates has no jurisdiction of any matters in litigation between the surviving spouse and the heirs of the deceased, arising subsequently to the dissolution of the community, particularly of such as may result from the obligations of one of the parties as a *negotiorum gestor*. *Stewart* v. *Pickard*. 18.

II. *Probate of Will.*

2. The admission of a will to probate, and the order for its execution, are but preliminary proceedings necessary to the administration of the estate; and do not amount to a judgment binding on persons not parties thereto.
Succession of Duplessis, 193.

III. *Of Executors, Administrators, Curators and Syndics.*

3. Certain slaves were directed to be emancipated by the will of the deceased, and the will was admitted to probate, and an executor qualified, who died without having executed any part of it. No executor was appointed in his place; but the heirs, protesting against the validity of the will, took possession of the property, which they sold, including the slaves ordered to be set free. On an application by a third person to be appointed dative testamentary executor, alleging that the succession had not been finally administered upon, as the slaves had never been emancipated, which appointment was opposed by the heirs as unnecessary: *Held*, that the facts of the case show no necessity for the appointment of an executor; that the slaves, having been sold and passed into the hands of others, their right to freedom, which has not been impaired by the course pursued by the heirs, must be asserted contradictorily with the persons who purchased them, who are entitled to an opportunity of showing the nullity of the will. *Succession of Duplessis*, 193.

4. Administrators are placed by law on the same footing as curators of vacant estates. They have the same powers, and are subject to the same duties and responsibilities. *Ib.*

5. Under the 6th section of the act of 13th March, 1837, requiring executors, administrators, curators, and syndics to render full and fair accounts of their administration, at least once in every twelve months, under pain of dismissal from office, and of being condemned to pay interest at the rate of ten per cent a year on all sums for which they may be responsible, from the expiration of

the twelve months, the payment of such interest is a part of the penalty, and necessarily coupled with the removal from office, and one cannot be imposed without the other; and such penalties can be inflicted only in cases which have arisen since the promulgation of the act. *Succession of Desorme*, 479.

6. The syndic of a succession found, after an examination of his accounts, to owe a balance to the estate, should be condemned, like a curator or executor, to pay interest thereon, at the rate of five per cent a year, from the date of the judgment. C. P. 1007. *Ib.*

7. The services of counsel employed to obtain the appointment of a person as executor, are to be paid by the applicant, and not by the estate, whether the application succeed or fail. *Succession of Gourjon*, 541.

See *Heirs and Legatees*, 20.

IV. *Claims against Successions.*

8. Art. 2377 of the Civil Code, which provides that when the hereditary property of either of the spouses has been increased or improved during the marriage, the other shall be entitled to one half of the value of such increase or amelioration if proved to have been the result of the common labor or expense, does not contemplate that to ascertain the value of such increase or improvement, every item of improvement shall be estimated separately, and the aggregate amount added to the estimation of the land. This would often be unjust, as the increased value of the property would, in many cases, be far from equal to the original cost of such improvements. *Babin* v. *Nolan*, 373.

9. Interest will be allowed on debts due by estates administered by curators, executors, or administrators, if the estate be sufficient, from the death of the debtor, if then due, or, from the time of becoming due, if after that event, though no judicial demand have been made (C. P. 989); but this interest cannot exceed five per cent on debts, on which a higher rate has not been stipulated in writing by the terms of the contract. *Succession of Desorme*, 474.

V. *Sale of Property of Successions.*

10. Where a formal decree of a Court of Probates, recognizing the necessity of selling the property inherited by minors, for the payment of the debts of the succession, was rendered after giving an opportunity to the attorney of the absent heirs to show that no such necessity existed, a purchaser of the property will not be bound to look beyond the decree. *Valderes* v. *Bird*, 396.

11. Where the sale of the property of a succession is made for the payment of debts, it may be sold for less than the appraised value. *Ib.*

12. Want of sufficient time for advertising between the date of the judgment of a Court of Probates ordering the sale of the property of a succession and the sale, is a defect cured by the lapse of five years. It is such an irregularity as the act of 10th March, 1834, relative to advertisements, was made expressly to remedy. See sect. 4. The act applies to proceedings and sales previous to its passage; but the prescription of five years runs only from the date of the act, as to anterior defects and informalities. *Ib.*

13. A creditor of a succession, having a special mortgage, may require the sale of the mortgaged property to be made for cash, provided its appraised value be obtained. In this respect his wish must always prevail over that of the other creditors. C. P. 990, 991, 992. C. C. 1163. *Succession of Ogden*, 457.

14. Where an administrator has been appointed to a succession, the widow in community, and the tutrix of the minors who are necessarily beneficiary heirs, have no right to interfere, and have nothing to claim until the debts of the estate are paid, and the administration legally terminated. The sale of the property of such an estate for the payment of its debts, is not subject to the formalities prescribed for the alienation of the property of minors, the beneficiary heir having but a residuary interest in the estate, which can only be ascertained by a full administration. C. C. 1148, 1151. *Ib.*

VI. *Of Heirs and Legatees.*

15. The will of one who died without legitimate children or descendants, contained the following provision: *J'institue pour ma légataire unique et universelle, ma sœur E. P., lui donnant et lui léguant à ce titre la généralité des biens que je délaisserai à mon déces. Held*, that this was an absolute institution of an universal heir, by which the legatee became entitled to the whole estate of the testator, and, after the death of the testator, seized of right of the effects of the succession, without being bound to demand the delivery thereof. C. C. 1599, 1602. *Prevost* v. *Martel*, 512.

16. Art. 1474 of the Civil Code which declares, that where the father disposes in favor of his nutural children of the portion permitted by law to be so disposed of by him, he shall dispose of the rest of his property in favor of his legitimate relations, unless he bequeath the rest to some public institution, does not constitute his legitimate relations his forced heirs for the rest of his estate. He is bound to dispose of the rest of his property in favor of his legitimate relations, but he may bequeath it to such of them, one or more, as he may select. *Ib.*

17. Except in the case of accretion from legacies made to several conjointly, as provided for by arts. 1700, 1701 of the Civil Code, the legitimate heirs of a testator will inherit from him only such portion of the succession as may remain undisposed of, either because the testator has not bequeathed it to any legatee or instituted heir, or because the heir or legatee has not been able or willing to accept it. C. C. 1702. Legatees by an universal or particular title, benefit by the failure of the particular legacies which they were bound to discharge (C. C. 1697); and an universal legatee, when he concurs with a forced heir (C. C. 1603), and, *à fortiori*, when he does not, is bound to discharge all the legacies, except in case of reduction. Consequently, where a testator, dying without legitimate descendants, but leaving several brothers and sisters, institutes one of them his universal heir, such universal heir or legatee will be entitled to the benefit resulting from the failure or reduction of the particular legacies, to the exclusion of the other brothers and sisters. *Ib.*

18. Where the instituted heir consents to the execution of the particular legacy, the particular legatee cannot contest the right of the legitimate heirs to attack

his legacy as illegal. The unwillingness or refusal of the instituted heir to contest the particular legacy, cannot render it valid; and the particular legatee being incapable of receiving, and the instituted heir unwilling to accept it, the particular legacy remains undisposed of, and must, under article 1702 of the Civil Code, devolve upon the legitimate heirs. *Ib.*

19. A testator, dying without descendants, instituted one of his sisters his universal heir. Another sister and a surviving brother commenced an action against the executor of the deceased, the particular legatees, and the instituted heir, for the purpose of causing the legacies to be declared null. The instituted heir answered, through her attorney in fact, that plaintiffs could not attack the will, as the respondent, being the universal legatee of the testator, was entitled to claim the whole of his estate; averred that the dispositions of the will were legal and valid; and prayed that the petition might be dismissed, and the will maintained in all its parts. *Held*, that the averment of the validity of the will, and the prayer for its execution, do not amount to an acquiescence, on the part of an instituted heir, in the illegal dispositions, nor to a consent that the legatees shall take the legacies, notwithstanding their illegality. *Ib.*

20. A testator appointed two persons as his executors, and named two others, A. and B., to replace them, in case of the death or absence of the former, leaving a certain sum to each of those who might discharge the duties of executor. One of the persons first named having died, A. applied to be appointed executor in his place, which was opposed by B., who claimed the appointment. A. obtained a dismissal of his application as in case of non suit; and a judgment was rendered refusing to appoint B., from which the latter appealed, citing A. as appellee. Pending this appeal, A. renewed his application to the Probate Court, and was appointed executor; and from this judgment no appeal was taken. The first named executor and A. having administered on the estate, afterwards filed a tableau of distribution, by which one of the sums bequeathed to the acting executors was allowed to A., and this tableau was homologated by the Probate Court. A decision being subsequently rendered on the appeal of B., by which the latter was declared to be entitled to the appointment of executor, a rule was taken by him in the Probate Court on A., and on the first named executor, to show cause why the legacy should not be paid to him, B. The rule was made absolute, and the judgment affirmed on appeal.

Succession of Gourjon, 541.

See *Sale of Property of Successions*, 14.

VII. *Tableau of Distribution.*

21. The notification of the filing of the account and tableau of distribution of an executor, operates as a citation to all persons concerned, creditors as well as legatees; and the homologation of the account and tableau, bars all further enquiry as to all matters included therein. *Succession of Peytavin*, 118.

SURETY.

1. Sureties on an appeal bond are liable only where it is shown, that there is not sufficient property of the debtor to satisfy the execution. C. P. 596. This fact can be proved only by the return of the officer, charged with the execution of the judgment, showing a compliance with all the requirements of the law. A return that no property was found, and that no demand was made of the debtor, because he could not be found, without showing that any demand was made of the plaintiff in execution, his agent, or counsel, is insufficient to render the sureties liable. C. P. 726, 727. *Lynch* v. *Burr*, 136.

2. No proceedings can be had against the sureties on an appeal bond, where the *fi. fa.* against the debtor was returned into court before the return day. *Per Curiam:* Had the execution remained longer in the hands of the officer, he might have found property. At all events, the surety is entitled to the advantage of every legal delay. *Ib.*

3. Where a suspensive appeal, taken from a judgment recovered in a lower court and recorded in the mortgage office, leaves the judgment unreversed, the plaintiff will be bound to urge any right he may have acquired on the property of the debtor by the recording of his mortgage, before resorting to the surety on the appeal bond. C. P. 579. *Turner* v. *Parker*, 154.

4. From the nature and terms of the obligation of the surety on an appeal bond, no recourse can be had against him where property belonging to the mass of the creditors of the appellant, subject to certain privileges and mortgages, is yet unsold. It must in such a case be shown by the creditor, that the sale of all the effects of the principal has proved insufficient to discharge his demand. C. P. 579, 596. Act 20 March, 1839, s. 20. But where it is proved that the appellant had been declared a bankrupt under the act of Congress of 1841, and that his estate, though in course of administration, is in such a situation as to afford no reasonable ground to expect that any dividend will ever be paid to the suing creditor, he will not be bound to await the final liquidation of the bankrupt's estate, before proceeding against the surety on the appeal bond.
Flower v. *Dubois*, 191.

5. A surety is bound for the same thing as his principal, and cannot be bound under more onerous conditions (C. C. 3006); and no reservation which a creditor can make in a contract containing a novation of the debt, or allowing an extension of time to the principal debtor, can preserve his rights against a surety not a party to the contract. *Gustine* v. *Union Bank of Louisiana*, 412.

6. A judgment obtained against a surety does not change the character of his debt, nor his relation to the principal debtor; and a prolongation of time granted to the latter will release the former, in the same manner as if no judgment had been obtained. The judgment creditor can do no act, whereby the rights or recourse of the surety against the debtor may be destroyed or impaired. If he make a novation, or grant time to the principal debtor, the surety is as effectually discharged, as if the judgment had been satisfied. C. C. 2194, 3022. *Ib.*

7. The surety in a bond taken under a writ of arrest cannot be made liable, where the writ was illegally issued. *Thornhill* v. *Christmas*, 543.

TAXES.

See New Orleans and Carrollton Railroad Company.

TUTOR.

See Minor.

WARRANTY.

See Sale, 8, 9, 10, 11, 12.

WILL.

See Donations Mortis Causa.

END OF VOLUME X.